IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

Nos. 3, 10, and 71

MAURICE E. TRAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA

BRIEF FOR THE PETITIONER

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Opinions Below

The majority and minority opinions of the court below in No. 10 (R. 903-30) are reported at 269 F. 2d 928, 946. The majority and concurring opinions of the court below reversing petitioner's conviction after his first trial are reported at 247 F. 2d 130, 136. The opinions of the District Court for the District of Colorado in Nos. 3 (R. 44-52) and 71 (R. 22-26) are unreported, and both cases were affirmed by the Court of Appeals without opinion.

Jurisdiction

The judgments of the Court of Appeals were entered on March 27, 1959 in No. 3 (R. 59), August 3, 1959 in No. 10 (R. 930), and March 22, 1960 in No. 71 (R. 28). A petition for rehearing in No. 10 was denied August 21,

1959 (R. 935-36). On April 6, 1959 Mr. Justice Whittaker extended the time for filing a petition for a writ of certiorari in No. 3 to May 26, 1959, and on September 8, 1959 he extended the time for filing such a petition in No. 10 to October 20, 1959. The petitions for certiorari in Nos. 3, 10 and 71 were filed respectively May 25, 1959, October 16, 1959, and April 18, 1960, and all three were granted May 31, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

In No. 10 the Court of Appeals for the Tenth Circuit affirmed a judgment of the District Court of the United States for the District of Colorado, entered upon a jury verdict under an indictment, finding petitioner guilty under 18 U. S. C. 1001 for filing false non-Communist affidavits under Sec. 9(h) of the Taft-Hartley law, 29 U. S. C. 159(h), now repealed. It is not disputed that petitioner was a member of the Communist Party prior to August 1949, and that the affidavits were executed by him and mailed in Denver, Colorado, and filed with the National Labor Relations Board in Washington, D. C., in 1951 and 1952.

The questions presented in No. 10 are:

(1) Whether the venue was properly laid in the judicial District of Colorado;

(2) Whether the trial court erred in denying petitioner's motions at the trial for the production, to the defense or the court, of grand jury testimony of prosecution witnesses;

(3) Whether the evidence is sufficient to support the judgment of conviction, either with or without reference to the evidential requirements of perjury trials;

(4) Whether the petitioner was denied a fair trial by the trial court's (a) rulings on certain of petitioner's motions for production under 18 U. S. C. 3500, (b) rulings on the admission and exclusion of evidence, or (c) instructions to the jury with respect to the indicia of membership in the Communist Party in the Communist Control Act of 1954, the meaning of the terms "membership" and "affiliation", and the evidence necessary to justify a verdict of guilt.

The question presented in Nos. 3 and 71 is:

(5) Whether the trial court erred in denying, without a hearing, both the petitioner's motions for a new trial based on newly discovered evidence with respect to the credibility of one of the three prosecution witnesses.

Statutes Involved

The relevant provisions of the Constitution of the United States, the "false statements" act, 18 U. S. C. 1001, the National Labor Relations Act, as amended by the Labor Management Relations Act of 1957, the so-called "continuing offense" statute, 18 U. S. C. 3237, the Communist Control Act of 1954, and the Act of September 2, 1957, 18 U. S. C. 3500, are set forth in the Appendix, *infra* pp. 1a-6a.

Statement

The indictment (R. 1-4), returned October 28, 1954 in the United States District Court for the District of Colorado, charges the petitioner with violations of 18 U. S. C. 1001, perpetrated by making and filing two false non-Communist affidavits pursuant to Sec. 9(h) of the

Taft-Hartley law.[1] The affidavits were executed in Denver, Colorado in December 1951 and December 1952, and were received and filed at the National Labor Relations Board in Washington, D. C. (R. 27-34).

The petitioner, Secretary-Treasurer of the International Union of Mine, Mill and Smelter Workers at the time the affidavits were filed, was first tried late in 1955. He was convicted under four counts of the indictment,[2] of which two charged a false denial of Communist Party "membership" in each of the two affidavits, and two charged a false denial of Communist Party "affiliation" therein. He was sentenced to a total of eight years in prison and was fined $8,000.[3]

The conviction was reversed by the Court of Appeals because the trial court had permitted improper cross-examination of petitioner's witnesses. *Travis* v. *United States*, 247 F. 2d 130. The Court of Appeals held, however, that venue in Colorado was proper, and gave directions to the trial court concerning the jury instructions to be given at a second trial. These matters are among those presented by this petition.

Petitioner was tried again early in 1958. He did not dispute that he had been a member of the Communist Party

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[1]Sec. 9(h) was repealed by Sec. 201(d) of the Labor-Management Reporting and Disclosure Act of 1959, P. L. 86-257, 73 Stat. 519. Sec. 504(a) of the new act provides that no person who is or has been a member of the Communist Party, or who has been convicted of certain felonies, may hold office in a union or be employed in certain other capacities during, or for five years after the termination of, his membership in the Party. 29 U. S. C. 504(a).

[2]Two other counts of the indictment, charging that petitioner falsely denied "support" of the Communist Party in each of the two affidavits, were dismissed on the Government's motion prior to the first trial (R. 15-16).

[3]Petitioner was fined $2,000 on each of the four counts. He was sentenced to imprisonment for four years on each of the two membership counts, the terms to run consecutively, and to the same prison terms on the two affiliation counts, to run consecutively with each other but concurrently with the terms of the membership counts.

prior to August 1949, and the prosecution did not dispute that, during that month, petitioner had made a public statement (R. 891) of resignation from the Communist Party "in order to make it possible for me to sign a Taft-Hartley affidavit". Thus, the issue for trial was whether or not petitioner's resignation from the Party was a pretense, in that he continued to maintain his membership at the time the affidavits specified in the indictment were filed.

Necessarily, this was the theory of the prosecution's case. Nevertheless, the prosecution offered, through one of its three witnesses, extensive testimony relating to the period from 1942 to 1948, during which petitioner's Party membership was not at issue either legally or factually. This witness (one Kenneth Eckert) also testified, over petitioner's objection, that (R. 118) the "policy of the Party was that once having joined the Communist Party you could not leave without being expelled".[4]

The prosecution introduced no evidence that, after the announcement of his resignation in 1949, petitioner paid dues or made other financial contributions to the Communist Party, attended Party meetings, carried out Party instructions, or engaged in any Party activities whatsoever or considered himself bound by Party discipline. There was no other direct evidence of any sort that petitioner had maintained his membership in or affiliation with the Party after his public resignation.

The prosecution's evidence offered to prove continued membership consisted entirely of observations and comments allegedly made by the petitioner in conversation with the other two prosecution witnesses, William Mason and Fred Gardner. Mason testified (R. 463-64) that Travis had told him that the public statement of resignation "had

[4] The admission of this testimony was prejudicial error, as shown *infra*, pp. 51-55.

been cleared with Ben Gold and the Party people in New York", and had made statements in 1952 and 1953 indicative of a continuing Party sympathy. Gardner testified that in 1951 Travis confided to him that his "public"[5] resignation from the Party "was a mistake because it gave the enemies of the Party an opportunity to use that in pointing out that his wasn't a true resignation from the Party, that . . . the enemies of the Party recognized that this was not an actual resignation . . ."

Although these and other alleged statements by the petitioner were received as "admissions", it will be seen that few if any of them,[6] fairly read, are admissions of Party membership or affiliation, particularly in the light of petitioner's 1949 public statement (R. 891) that, although he had resigned from the Party, he had not abandoned his "belief in Communism." For example, Travis' alleged statement to Gardner that "the enemies of the Party" did not regard his resignation as an actual one is very far from being an admission that either Travis or the Party did not so regard it. None of these "admissions" was corroborated by other evidence. Admittedly, the proof does not meet the evidential requirements applicable in perjury trials.

During the trial, the court denied petitioner's motions for production, either for the defense or for examination by the court, of the prosecution witnesses' grand jury testimony. In addition, the court improperly limited the cross-examination of the prosecution witnesses and, in ruling on defense motions under 18 U. S. C. 3500, improperly limited the application of that statute. In charging the jurors the

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[5]Summarizing this testimony in its Brief in Opposition to the petition (p. 7), the Government uses the much more damaging phrase "formal resignation" but the witness in fact referred to the "public resignation" (R. 443).

[6]They are set forth in the opinion below (R. 907-10), 269 F. 2d at 934-36.

court (R. 871-72) instructed them in the indicia of Communist Party membership set forth in the Communist Control Act of 1954, 50 U. S. C. 844, for their guidance in determining the issue of Party membership.

Petitioner was convicted on all four counts, and was again sentenced to imprisonment for eight years and fined $8,000. On appeal, the judgment of conviction was affirmed by a divided court. Judge Murrah dissented (R. 928-30; 269 F. 2d at 946, on the grounds that the evidential requirements of perjury convictions had not been met, and that the trial court should have examined the grand jury minutes.

Summary of Argument

I. *The Venue is Improper.* A. The Sixth Amendment to the Constitution requires that federal crimes be tried in the district where the crime was "committed." Petitioner was an officer of a national union, and under Section 9(h) of the Taft-Hartley law and the regulations of the National Labor Relations Board, his non-Communist affidavit was required to be filed with the Board in the District of Columbia. Section 9(h) makes 18 U. S. C. 1001, the so called false statement statute, applicable only to affidavits which are "on file with the Board." The essential allegation of the indictment is that petitioner caused false affidavits to be filed with the Board in Washington. Until the affidavits were filed there was no "matter within the jurisdiction of" any federal agency, within the meaning of 18 U. S. C. 1001. Indisputably the offense was committed in, and proper venue lay in, the District of Columbia. The Government does not contest this conclusion, which is supported by numerous decisions of this Court and the lower federal courts. *In re Palliser,* 136 U. S. 257; *United States* v. *Valenti* 207 F. 2d 242 (C. A. 3).

B. There is no basis for additional venue in the district of Colorado, since the offense was neither begun nor committed there within the meaning of the so-called "continuing offense" statute, 18 U. S. C. 3237. *United States* v. *Valenti*, 207 F. 2d 242 (C.A. 3). The place where petitioner's affidavit was to be filed is fixed by law in the District of Columbia, and this Court has squarely held that where the law prescribes the place where an act is to be performed, venue lies *only* at that place. *United States* v. *Lombardo*, 241 U. S. 73. The indictment fails to charge the commission of a federal offense in Colorado. Strong considerations of judicial policy likewise militate against multiple venue, and therefore require the dismissal of this indictment.

II. *Petitioner's Motions for Production of Grand Jury Testimony were Erroneously Denied.* A. Petitioner's showing of "particularized need", within the standard thus expressed in *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395, was sufficient. The crucial evidence against petitioner consisted entirely of uncorroborated "admissions", and it was plainly relevant to determine whether the prosecution witnesses had described these admissions in the same terms, or at all, to the grand jury. Furthermore, the trial court erroneously refused to allow petitioner to cross-examine the prosecution witnesses with respect to their grand jury testimony.

B. If not made available directly to the petitioner, the grand jury minutes should at least have been examined by the trial court *in camera*, to determine whether or not they contained testimony material to the evidence given at the trial. The trial court's refusal to examine the grand jury minutes was directly contrary to the long-established practice in the Court of Appeals for the Second Circuit, where such examination, on request of the defense counsel, is

virtually automatic, and its denial constitutes reversible error. *United States* v. *Hernandez*, F. 2d (Aug. 24, 1960); *United States* v. *Zborowski*, 271 F. 2d 661; *United States* v. *McKeever*, 271 F. 2d 669; *United States* v. *Spangelet*, 258 F. 2d 338. Every consideration of judicial policy supports the propriety and necessity of such examination, and its denial here equally requires reversal of the conviction.

III. *The Evidence was Insufficient to Support the Judgment of Conviction.* A. A conviction for perjury can not be sustained unless supported by the directly contrary testimony of two witnesses, or of one witness corroborated by evidence *aliunde*. That rule, none of the exceptions to which is governing here, applies to prosecutions under the statutes involved in this case, since false swearing in an affidavit duly filed is the essence of the offense. See *American Communications Association* v. *Douds*, 339 U. S. 382, 420, 436.

B. If the perjury rule applies here, the conviction must be reversed, since the trial court refused either to apply the rule in passing on petitioner's motion to dismiss, or to instruct the jury in accordance therewith. *Weiler* v. *United States*, 323 U. S. 606. The evidence plainly does not meet the requirements of the rule, and the government does not so contend.

C. The only evidence of petitioner's membership in or affiliation with the Communist Party, at the time the affidavits were filed, consists of uncorroborated extra-judicial admissions made, if at all, after the commission of the offense. Such evidence is insufficient to sustain a conviction. *Opper* v. *United States*, 348 U. S. 84. The government's attempted distinction between admissions to government agents and to private persons is untenable. See *United States*

v. *Carminati*, 247 F. 2d 640, 644 (C. A. 2); *United States* v. *Nystrom*, 237 F. 2d 218, 225 (C. A. 3).

D. Even without reference to the foregoing rules, the evidence was insufficient. There was no evidence of any overt conduct indicative of petitioner's continued membership in the Communist Party, nor of his continuing "desire" to belong, nor of the Party's continuing "recognition" of his membership. Taken at face value, the evidence shows nothing more than a continuing sympathy with certain communist purposes. This is insufficient to establish either membership in or affiliation with the organization. *Bridges* v. *Wixon*, 326 U. S. 135; *Galvan* v. *Press*, 347 U. S. 522.

IV. *Petitioner Was Denied a Fair Trial by The Court's Evidential Rulings and Application of 18 U. S. C. 3500.*

A. Prejudicial evidence was erroneously admitted. The witness Eckert was permitted, over objection, to testify (R. 118) that the policy of the Communist Party was "that once having joined you could not leave without being expelled." Since there was no evidence that any such policy was known to the petitioner, this testimony was incompetent and irrelevant. Furthermore, it is directly contrary to the basis upon which the constitutionality of this provision of the Taft-Hartley law was upheld, as stated by this Court in the *Douds* case, 339 U. S. at 414.

B. Petitioner's cross-examination of prosecution witnesses was erroneously and prejudicially restricted. The trial court refused to allow questioning with respect to the witness Mason's interrogation by the Immigration and Naturalization Service in 1952, to show that Mason, a naturalized citizen, was fearful of denaturalization and deportation because of past Communist Party membership. The Court likewise refused to permit questioning of the witnesses Eckert and Gardner with respect to rivalry and hostility between petitioner's union, from which Gardner

had been discharged and Eckert separated, and the unions by which they were subsequently employed. Those matters were appropriate subjects of cross-examination to show bias and interest, and the rulings were an abuse of the trial court's discretion.

C. The trial court's interpretation and application of 18 U. S. C. 3500 were erroneously and prejudicially limited. The court disregarded the injunction of *Palermo* v. *United States*, 360 U. S. 343, that documents of doubtful status under 18 U. S. C. 3500(e) should be produced for *in camera* examination to determine whether or not they fall within the statutory language. It likewise failed to require the government to ascertain whether or not the prosecution witnesses had made statements to government attorneys or to Congressional investigative agents, contrary to the terms of the statute.

V. *Petitioner Was Denied a Fair Trial by the Court's Charge to the Jury with Respect to Membership in and Affiliation with the Communist Party.* The trial judge embodied in his charge eleven of the thirteen evidentiary indicia of membership set forth in Section 5 of the Communist Control Act of 1954, 50, U. S. C. 844. Assuming the statutory indicia had any proper place in the charge, omission of the first two (listing as a member and financial contributions to the Party), with respect to both of which there was a complete failure of proof, was plainly prejudicial. But the other indicia, especially paragraphs (6), (9), (11), (12), and (13), are vague and irrelevant to the issues of membership and affiliation, and highly prejudicial. Their inclusion in the charge both deprived petitioner of a fair trial, and violated his rights under the First Amendment.

VI. *Petitioner's Motions for a New Trial Based on Newly Discovered Evidence Were Erroneously Denied.* The new evidence in No. 3, based on Army service records and the witness' own testimony in another case, indisputably shows that the witness Fred Gardner gave false testimony in the other case, and false information to the Federal Bureau of Investigation, to the effect that he had never served in the armed forces when in fact he had deserted from the Army in 1926. The new evidence in No. 71 shows that Gardner gave false testimony in the present case and the other case about his marital history. These facts serve to discredit Gardner's veracity and, since he was one of two witnesses who testified to petitioner's uncorroborated post-affidavit "admissions", the new evidence goes to the heart of the government's case. Under these circumstances, it was an abuse of discretion to deny the motions for a new trial.

Argument

The trial of this cause precipitated procedural issues which are basic to the fair administration of criminal justice in the courts of this nation. Some of them—for example, the extent of a defendant's right to the production of grand jury testimony given by prosecution witnesses—may and do arise in criminal proceedings of any description. Others, such as the applicability here of the evidential requirement observed in perjury trials, or the legally cognizable indicia of "membership", are of special importance for the ever more numerous cases where, as here, the defendant is accused of misrepresenting his political affiliations or beliefs. All of these issues touch closely on the guarantee of fairness embodied in the due process clause.

I.

THE VENUE WAS IMPROPER

At the threshold of this case, however, lies the issue of venue, which arose before the trial began (R. 5). The affidavits on which the charge of falsity is based were filed, as the law requires, in the District of Columbia. Not until they were so filed was there any offense against the laws of the United States, or any matter within the jurisdiction of any federal agency. Unless the Government can support the jurisdiction of the District Court of Colorado, where the petitioner was tried, the entire proceeding is a nullity and the indictment must be dismissed. And, as was remarked in *United States* v. *Johnson*, 323 U. S. 273, 276: "Questions of venue in criminal cases . . . are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed."

A. The offense with which petitioner is charged was committed in the District of Columbia.

Under the Sixth Amendment to the Constitution, one who is accused under federal law is entitled to be tried in the district "wherein the crime shall have been committed." Under this requirement, ". . . determination of proper venue in a criminal case requires determination of where the crime was committed." *United States* v. *Cores*, 356 U. S. 405, 407. To make this determination, it is necessary to see (a) what acts are proscribed or required by the criminal statute, and (b) what acts are charged in the indictment. *Johnston* v. *United States*, 351 U. S. 217, 220.

Section 9(h) of the Taft-Hartley law did not absolutely require that union officers file non-Communist affidavits, but

prescribed such filings as a condition precedent to a union's use of the Labor Board's procedures. *Leedom* v. *International Union of Mine, Mill and Smelter Workers*, 352 U. S. 145; *Amalgamated Meat Cutters* v. *National Labor Relations Board*, 352 U. S. 153. Nor did Section 9(h) specify its own penalties for filing false affidavits; rather it made 18 U. S. C. 1001 (the "false statement" statute) "applicable in respect of such affidavits". The "such" clearly refers back to affidavits which are "on file with the Board". The false statement statute makes it an offense knowingly to make or use a false statement or document "in any matter within the jurisdiction of any department or agency of the United States."[7]

Each count of the indictment (R. 1-4) charges the petitioner with a violation of 18 U. S. C. 1001 in that he knowingly "made and used, within the District of Colorado, a false writing and document, namely an 'Affidavit of Non-communist Union Officer', (Form NLRB 1081), executed within the District of Colorado . . . which false writing and document the said Maurice E. Travis filed and caused to be filed with the National Labor Relations Board in the City of Washington, District of Columbia . . ." The affidavits signed by petitioner, on Form NLRB 1081 referred to in the indictment, carry on the reverse side (R. 885) "Instructions for the Use of This Form", include the following:[8]

> "National and International Labor Organizations must file this affidavit with the Affidavit Compliance Branch, National Labor Relations Board, Washington 25, D. C.

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[7]Both Sec. 9(h) of the Taft-Hartley law and 18 U. S. C. 1001 are set forth in the Appendix, *infra* pp. 1a-2a.

[8]It is not disputed that petitioner was an officer of a national and international labor organization, nor that petitioner was required, by the regulations of the Labor Board, to file the affidavit with the Board in Washington. 247 F. 2d at 132, note 2.

Local Labor Organizations must file this affidavit with the Regional Office of the National Labor Relations Board with which they usually file cases.

It is apparent, therefore, that the offense with which petitioner is charged was committed (if committed at all) in the District of Columbia. The indictment charges that the petitioner filed the affidavits there. Lacking such an allegation, the indictment would not state an offense under the laws of the United States, for Section 9(h) of the Taft-Hartley law makes 18 U. S. C. 1001 applicable only to affidavits which are on file with the Board. Furthermore, until the affidavits were filed there was no "matter within the jurisdiction of any department or agency of the United States" within the meaning of 18 U. S. C. 1001.

To be sure, Congress might have enacted a statute making it an offense to prepare, or execute, or deposit in the mail a false affidavit for use under Section 9(h) of the Taft-Hartley law, and in that event the offense would be committed where the affidavit was prepared, executed or mailed. Such statutes have been enacted with respect to the preparation of income tax returns,[9] as well as to prohibit the *posting* of ransom letters,[10] the *depositing* of lottery or other unlawful literature in the mail,[11] or the *transmitting* of false pension papers.[12]

But under Section 9(h), the statute proscribed filing a false affidavit and the offense is committed when and where the affidavit is filed. The lower federal courts have so ruled

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[9] *United States* v. *Albanese*, 224 F. 2d 879 (C. A. 2); *United States* v. *Hoover*, 233 F. 2d 870 (C. A. 3); *Beaty* v. *United States*, 213 F. 2d 712 (C. A. 4); *cf. Ex parte Shaffenburg*, Fed. Cas. No. 12,696 (C. C. D. Col.).

[10] *United States* v. *Streiel*, 99 F. 2d 474 (C. C. A. 2).

[11] *United States* v. *Ross*, 205 F. 2d 619 (C. A. 10); *United States* v. *Conrad*, 59 Fed. 458 (C. C. D. W. Va.).

[12] *United States* v. *Bickford*, Fed. Cas. No. 14,591 (C. C. D. Vt.).

in every case[13] that has arisen under this law, generally with the observation that, until the affidavit is filed, there is no "matter within the jurisdiction of" the Labor Board.[14]

We do not understand that the Government contests this conclusion[15] which, in any event, is in line with the general rule that, where the offense charged is the filing, delivery, or receipt of a false or otherwise unlawful document, the offense is committed where the document is filed, delivered, or received. *In re Palliser*, 136 U. S. 257; *Burton* v. *United States*, 196 U. S. 283;[16] *Reass* v. *United States*, 99 F. 2d 752 (C. C. A. 4); see *United States* v. *Lombardo*, 241 U. S. 73, 76: "A paper is filed when it is delivered to the proper official and by him received and filed."[17] Directly

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[13]The opinion below in the instant case is not to the contrary, since the decision goes on the theory that the offense, though committed in Washington, was begun in Denver. This question is discussed *infra*, pp. 17-29.

[14]*United States* v. *Valenti*, 207 F. 2d 242, 244 (C. A. 3); *Hupman* v. *United States*, 219 F. 2d 243, 246-247 (C. A. 6); *United States* v. *Killian*, 246 F. 2d 77, 80 (C. A. 7); *Sells* v. *United States*, 262 F. 2d 815, 821 (C. A. 10); *United States* v. *Bryson*, 16 F.R.D. 450, 453 (N. D. Cal.).

[15]Hugh Bryson, an officer of a national union, was indicted in the District of Columbia for filing with the Board an affidavit executed and mailed in California. *United States* v. *Bryson*, 16 F.R.D. 431 (N. D. Cal.). The indictment in the District of Columbia followed Judge Carter's suggestion that the difficulties concerning venue in California would be removed by proceeding in the District of Columbia. *United States* v. *Bryson*, 16 F.R.D. 450 (N. D. Cal.). Thereafter the Government moved to dismiss the indictment in California on the ground that the offense had more probably been committed in the District of Columbia, and District Judge Goodman granted the motion with the observation that the attorney general's "decision in that regard appears to be based on good reason. . . ." *United States* v. *Bryson*, 16 F.R.D. 453 (N. D. Cal.).

[16]Compare the later case, *Burton* v. *United States*, 202 U. S. 344, in which the same defendant was indicted for *agreeing to receive* (rather than receiving) unlawful compensation, and venue was held proper in the district where the agreement was made, rather than where the compensation was received.

[17]See also *Wampler* v. *Snyder*, 66 F. 2d 195 (C.A.D.C.); *Fuller* v. *United States*, 110 F. 2d 815 (C.C.A. 9); *Bowles* v. *United States*,

applicable here are the words of William Howard Taft, then Solicitor General, in his brief (pp. 24-25) for the Government in the *Palliser* case, *supra*:

> "The gist of the offense is the offer to an officer . . . It would seem, therefore, that the place where the officer was when approached and solicited would be the place of the crime. If the communication never reached the officer it would be no crime."

B. Venue in the District of Colorado cannot be supported under the so-called "continuing offense" statute, 18 U. S. C. 3237.

Accordingly, the issue in the present case is not whether proper venue lies in the District of Columbia *or* the District of Colorado. Venue lies in the District of Columbia because the offense charged was committed (if at all) therein. The only issue is whether there is *also* venue in the District of Colorado, on the theory that the offense was "begun" there by the execution of the affidavits (as charged in the indictment) or by their deposit in the mail (as subsequently stipulated, R. 27-34). The Government and the court below concluded that there was venue in Colorado as well as in Washington, relying on the so-called "continuing offense" statute which reads, in relevant part,[18] as follows (18 U. S. C. 3237):

> "Except as otherwise expressly provided by enactment of Congress, any offense against the United

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73 F. 2d 772 (C.C.A. 4); *Shurin* v. *United States*, 164 F. 2d 566 (C.C.A. 4); *United States* v. *Borow*, 101 F. Supp. 211 (D.N.J.); *United States* v. *Lefkoff*, 113 F. Supp. 551 (E.D. Tenn.); *United States* v. *Warring*, 121 F. Supp. 546 (D. Md.); *United States* v. *Eisler*, 75 F. Supp. 634 (D.D.C.); *United States* v. *Hill*, 8 F. Supp. 469 (M.D. Pa.) aff'd 74 F. 2d 940 (C.C.A. 3).

[18]The second paragraph of 18 U. S. C. 3237 (*infra*, p. 6a) relates only to offenses of which the use of the mails, or transportation in interstate commerce, is an essential element, and therefore is not relevant to this case.

States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed."

In the only other Court of Appeals decision on this issue, it was held that neither the execution nor the mailing of a Section 9(h) affidavit constitutes the beginning of an offense within the meaning of the statutory language, or suffices to support venue in any district other than the one wherein the affidavit is filed. *United States* v. *Valenti*, 207 F. 2d 242 (C. A. 3);[19] see also *United States* v. *Gibbons* and *Brown*, unreported, Crim. Nos. 27848(3) and 28017(2) (E. D. Mo.).[20] We submit that the decision below is wrong and that the *Valenti* case is right, under the language of the statutes here applicable and the reasoning of the courts in comparable cases, and on important grounds of judicial policy.

The legitimate scope of 18 U. S. C. 3237 is limited by the Sixth Amendment's guarantee of trial in the district "wherein the crime shall have been committed". See *United States* v. *Anderson*, 328 U. S. 699, 704-05; *Brown* v. *Elliott*, 225 U. S. 392, 402.[21] Furthermore, 18 U. S. C. 3237 is

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[19]The opinion by Circuit Judge Maris was concurred in by Chief Judge Biggs. Circuit Judge Hastie concurred on the ground that there was no proof of mailing in the district where the defendant was indicted and tried, but expressed the view that mailing a Section 9(h) affidavit does constitute a "beginning" within the meaning of 18 U. S. C. 3237.

[20]The *Gibbons* and *Brown* cases reached the same conclusion with respect to allegedly false financial information filed pursuant to Section 15g(g). In the *Bryson* case, where the affidavit was mailed from California, District Judge Carter expressed the view that venue could be supported in California under 18 U. S. C. 3237, while Judges Goodman and Murphy thought otherwise. *United States* v. *Bryson*, 16 F. R. D. 431, 450, 453.

[21]See also *United States* v. *Ross*, 205 F. 2d 619, 621 (C. A. 10); *United States* v. *Conrad*, 59 Fed. 458 (C. C. D. W. Va.); *United States* v. *Horner*, 44 Fed. 677 (S. D. N. Y.).

not a substantive provision of law, and does not itself make any federal offense a "continuing" one,[22] or prescribe what the "beginning" or the "completion" of any specific offense entails.

Constitutional obstacles do not arise when the offense is initially "complete" in the sense that all the essential elements are present, and the accused continues to commit the completed offense in another or several districts. Congress may then provide that the offense shall be punishable in any district where the continuing commission occurs. These are true "continuing offenses", such as unlawful use of the mails or continuing illegal transportation in interstate commerce. *Armour Packing Co.* v. *United States*, 209 U. S. 56; *United States* v. *Freeman*, 239 U. S. 117.[23]

Even in such cases, however, considerations of constitutional policy (rather than limitation) may lead the courts to confine venue to the state where the crime first became complete (in the legal sense), if it is not clear that Congress intended to make the offense a continuing one. Compare *United States* v. *Johnson*, 323 U. S. 273 ("use of the mails" for the shipment of unlicensed dentures not a continuing offense in the absence of express Congressional declaration) with *United States* v. *Cores*, 356 U. S. 405 ("remaining" in the United States after expiration of alien seaman's permit, a continuing offense even in the absence of Congressional declaration). And constitutional limitations may come into play when a complete offense is clearly not of a continuing

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[22] Except in the second paragraph of 18 U. S. C. 3237, irrelevant here. This second paragraph was enacted as a result of this Court's decision in *United States* v. *Johnson*, 323 U. S. 273, as is set forth in the Reviser's Note, based on H. Rep. No. 304, 80th Congress.

[23] See also *United States* v. *Floyd*, 228 F. 2d 913 (C. A. 7); *Bickford* v. *Looney*, 219 F. 2d 555 (C. A. 10); *Kreuter* v. *United States*, 218 F. 2d 532 (C. A. 5); *In re Richter*, 100 Fed. 295 (E. D. Wis.).

nature, and either Congress or the Department of Justice seeks to base venue on legally irrelevant subsequent events.[24]

The problem in the present case is the converse of those discussed above, for here the Government is seeking to use 18 U. S. C. 3237 to establish venue in a district where the crime is not yet complete. As all the decisions agree (*supra*, p. 16), the essence of the offense charged here is the *filing*, which took place in Washington. May 18 U. S. C. 3237 be constitutionally applied to support venue in a district in which the offense was *not* committed, in that only preliminary and not the proscribed acts took place there?

This Court has never so held,[25] and neither the language of nor the Congressional purpose embodied in the statute justifies any such result. Although its legislative origins are cloudy, it was born in close conjunction with the statute punishing conspiracies to defraud or commit offenses against the United States,[26] and it closely resembles the

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[24]See *United States* v. *Conrad*, 59 Fed. 458 (C. C. D. W. Va.), in which the offense was *depositing* lottery literature in the mails, and the court held unconstitutional a provision for trial in a district to which the literature was carried by mail. Whether or not rightly applied in that particular case, the principle of the decision is sound; clearly, Congress could not constitutionally provide that one who robs the mails may be tried in any district in which he is thereafter apprehended.

[25]The strong implications of *Burton* v. *United States*, 196 U. S. 283, 304, are in the negative, and the same is true of Mr. Justice Gray's opinion in the *Palliser* case, 136 U. S. at 267, in which the question was specifically reserved, as it was also in *Benson* v. *Henkel*, 198 U. S. 1. The Court has indicated that a conspiracy charge may be brought in the district where the agreement was entered into, even though the overt acts took place elsewhere. *Hyde* v. *Shine*, 199 U. S. 62; but *cf. Brown* v. *Elliott*, 225 U. S. 392, 402. However, the conspiracy cases are complicated by the concept that the crime of conspiracy is complete when the agreement is reached, and that the overt acts are not part of the offense. See *Hyde* v. *United States*, 225 U. S. 347, 367, and Mr. Justice Holmes' dissent therein.

[26]The conspiracy provision (now 18 U. S. C. 371) and the continuing offense clause (now 18 U. S. C. 3237) originally comprised the two sentences of Sec. 30 of "An Act to Amend Existing Laws

numerous State statutes covering crimes partly committed in each of several counties,[27] the purpose of which was to abrogate the old common law rule that where an offense comprised a series of acts, some of which took place in one county and some in another, there could be no prosecution in either.[28] There is no indication in the background of 18 U. S. C. 3237 that it was intended[29] to impinge upon the guarantee of the Sixth Amendment, and on well established principles of interpretation it should be construed so as to avoid constitutional doubts.

The present case must be approached in the light of these considerations. Congress has expressly provided that 18 U. S. C. 1001 shall only be applicable to Taft-Hartley

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Relating to Internal Revenue, and for Other Purposes", enacted March 2, 1867. See *United States* v. *Gradwell*, 243 U. S. 476, 481. This section was not part of the bill as it passed the House of Representatives; it was added as an amendment in the Senate Committee on Finance, and was adopted by the Senate without discussion on motion of the floor manager, Senator William Pitt Fessenden. See the *Congressional Globe*, 39 Cong. 2d Sess., pp. 1846, 1881, 1920 and 1968. The conspiracy portion became R. S. 5440, and the "continuing" portion R. S. 731.

[27]The Sixth Amendment, of course, binds only the Federal Government. Section 2 of Article III of the Constitution requires that the trial of all crimes shall be in the state where the crimes were committed, and this applies to both the federal and state governments. However, many state constitutions contain provisions requiring that trials be conducted in the county wherein the crime was committed, so that venue problems analogous to the one here posed also arise under state law.

[28]See *Matter of Murtagh* v. *Leibowitz*, 303 N. Y. 311, 101 N. E. 2d 753 (1951); *Wharton's Criminal Law and Procedure* (Anderson edit., 1957), Sections 1507 and 1510.

[29]In his opinion for the Court in *Hyde* v. *United States*, 225 U. S. 347 at 360, Mr. Justice McKenna observed, with reference to this statute (then R. S. 731), that: "This provision takes an emphasis of signification from the fact that it was originally a part of the same section of the statute which defined conspiracy—that is § 30 of the Act of March 2, 1867, 14 Stat. 484, c. 169. Nor has the provision lost the strength of meaning derived from such association by its subsequent separation . . ."

affidavits which are *on file*, and that 18 U. S. C. 1001 itself shall come into play only with respect to matters "within the jurisdiction" of a federal agency. Neither the execution nor the mailing of the affidavit in Denver constituted a filing, or established the Board's jurisdiction. Nothing that the petitioner is charged with doing in Colorado is unlawful under federal law.[30] How, then, can it be said that the offense was "begun" in Colorado, and how can venue be placed in Colorado, without raising grave questions under the Sixth Amendment?[31]

Accordingly, there is no statutory basis for, and serious constitutional difficulties would attach to, venue in Colorado in the present case. In comparable situations, this Court has said and the lower courts have held that 18 U. S. C. 3237 furnishes no basis for jurisdiction or venue except in the district where the filing (or other offense) takes place. The well-established rule is that, when the place for the performance of an act is specified by law (as here), a wrongful performance of or failure to perform the act is punishable at, and only at, the place so specified.[32] Such an offense is

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[30]Accordingly, the example of firing a bullet across a state line relied on in Judge Hastie's concurring opinion in the *Valenti* case, 207 F. 2d at 246, is not apt here, for firing a gun is an illegal act, even though the bullet strikes the victim in another state. Nor, in such cases, is there any problem of agency jurisdiction such as 18 U. S. C. 1001 involves. Even so, the rule at common law was that venue lies where the bullet strikes, not where it is fired. *United States* v. *Davis*, Fed. Cas. No. 14932 (C. C. D. Mass.); *cf. People* v. *Rathbun*, 21 Wend. 509, 536 (N. Y. 1839).

[31]Compare *In re Buell*, Fed. Cas. No. 2102 (C. C. E. D. Mo. 1875), in which the defendant was indicted in the District of Columbia for a criminal libel composed there but published in Michigan. In that case (apparently the first under the "continuing offense" statute, then R. S. 731), the Government contended that the offense had been begun in the District of Columbia, but the court rejected this "alarming and dangerous doctrine", on the ground that the offense charged was not completed in the District of Columbia.

[32]Quite distinct are statutes which prohibit conduct unless a document has *previously* been filed or obtained, such as driving a car with-

not "continuing", and does not have a "beginning" in a legal sense; the offense comprises a single act, committed only at the place specified by law.[33]

The principle is plainly stated in *United States* v. *Lombardo*, 241 U. S. 73, which the Court of Appeals in the *Valenti* case (207 F. 2d at 245) rightly thought governing in cases such as the present one. In the *Lombardo* case, the defendant was indicted under Section 6 of the White Slave act, which required one who harbored an alien prostitute to file a report with the Commissioner of Immigration within 30 days. The defendant was indicted at the place of harboring and the Government, invoking R. S. 731, contended that there was a continuing offense beginning with the failure to mail the report within the specified

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out a license or engaging in the numbers racket without having previously paid a tax. In such cases criminal liability attaches not to the failure to file or pay at a designated place, but to the subsequent conduct. *Beach* v. *United States*, 240 F. 2d 888 (C. A. D. C.); *Reynolds* v. *United States*, 225 F. 2d 123 (C. A. 5); *United States* v. *Bowman*, 137 Fed. Sup. 385 (D. D. C.).

[33] Even if the place is not fixed by law, the offense may be of such a nature that venue lies only where the document or other thing is delivered or received, and not where it is mailed. In the *Palliser* case, *supra*, where the offending letter was mailed in New York, Mr. Justice Gray said (136 U. S. at 267) that ". . . it might admit of doubt whether any offense against the laws of the United States was committed until the offer or tender was known to the postmaster . . ." in Connecticut. In *Burton* v. *United States*, *supra*, where the unlawful compensation was mailed by the payor in Missouri to the defendant-recipient in Washington the court held that there was no jurisdiction in Missouri, and Mr. Justice Peckham said (196 U. S. 304): "This is not a case of the commencement of a crime in one district and its completion in another, so that under the statute the court in either district has jurisdiction. Rev. Stat. sec. 731 . . . There was no beginning of the offense in Missouri. The payment of the money was in Washington, and there was no commencement of that offense when the officer . . . sent the checks from St. Louis to defendant. The latter did not thereby begin an offense in Missouri." See also *Horner* v. *United States*, 143 U. S. 207; *Salinger* v. *United States*, 272 U. S. 542.

time. But the court pointed out that Section 6 required *filing* at a specified place, and affirmed the lower court's order sustaining a demurrer to the indictment. Mr. Justice McKenna noted (241 U. S. at 77) that crimes consisting of "distinct parts" or involving "a continuously moving act" might support multiple venue under R. S. 731, and remarked that a father's breach of statutory obligation to support children might be triable either where the father neglected or where the child suffered. However, as he then stated (241 U. S. 78):

> "The principle is not applicable where there is a place explicitly designated by law, as in § 6."

The court below (247 F. 2d at 133) sought to distinguish the *Lombardo* case on the ground that it involved a failure to file a document, rather than the filing of a false one. Where, as here, the place of performance is fixed by law, it is difficult to understand why an offense should be considered as "begun" by mailing a false document, but not by failing to transmit any document at all. The attempted differentiation between misfeasance and non-feasance is an empty one, irrelevant to the question of venue, and without basis in logic or policy. It finds no support in the decisions of this Court and none, except for a single dictum,[34] in those of the lower federal courts.

It is true that many of the cases establishing venue solely at the place fixed by law for a performance—including the most recent decision by this Court[35]—are cases

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[34] *New York Central and H. R. R. Co.* v. *United States*, 166 Fed. 267, 270 (C. C. A. 2 1908).

[35] *Johnston* v. *United States*, 351 U. S. 217, involving a conscientious objector's failure to report for duty at a designated place. The dissent does not challenge the principle that venue lies at the place fixed by law for the performance of the obligation; rather it is based on the conclusion (351 U. S. at 224) that Congress did not make non-performance at the place so specified the essence

involving a wrongful failure to perform rather than a wrongful performance.[36] But the same rule has been applied in numerous cases where, as here, the alleged offense is one of misfeasance, and the charge is the filing of a false document at the place fixed by law for that purpose. *Bowles* v. *United States*, 73 F. 2d 772 (C. C. A. 4), cert. denied 294 U. S. 710; *United States* v. *Valenti*, 207 F. 2d 242 (C. A. 3); *Wampler* v. *Snyder*, 66 F. 2d 195 (C. A. D. C.).[37] These decisions are in line with the common law rule[38] and the guarantee of the Sixth Amendment, and

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of the particular offense. *Cf. United States* v. *Anderson*, 328 U. S. 699, 703. In the present case, there is no question but that the filing in Washington is specified in Section 9(h) as the essence of the offense under 18 U. S. C. 1001.

[36] *Rumely* v. *McCarthy*, 250 U. S. 283; *Jones* v. *Pescor*, 169 F. 2d 853 (C. C. A. 8); *United States* v. *Commerford*, 64 F. 2d 28 (C. C. A. 2); *Yarborough* v. *United States*, 230 F. 2d 56 (C. A. 4); *United States* v. *Neill*, 248 F. 2d 383 (C. A. 7); *United States* v. *Lennox*, 258 F. 2d 320 (C. A. 3); *United States* v. *Wyman*, 125 F. Supp. 276 (W. D. Mo.); *Matter of Murtagh* v. *Leibowitz*, 303 N. Y. 311, 101 N. E. 2d 753; *Regina* v. *Miller*, 2 Car. & K. 310 (N. P. 1846).

[37] Also *United States* v. *Aaron*, 117 F. Supp. 952 (N. D. W. Va.); *United States* v. *Warring*, 121 F. Supp. 546 (D. Md.); *United States* v. *Hill*, 8 F. Supp. 469 (M. D. Pa.); *United States* v. *Lefkoff*, 113 F. Supp. 551 (E. D. Tenn.); *cf. State* v. *Pollard*, 215 La. 655, 41 So. 2d 465. The same reasoning was applied, although the question of venue based on mailing was reserved, in *Reass* v. *United States*, 99 F. 2d 752 (C. C. A. 4); *Shurin* v. *United States*, 164 F. 2d 566 (C. C. A. 4) (with a strong dictum at 569 that mailing would not support venue); *United States* v. *Borow*, 101 F. Supp. 211 (D. N. J.).

[38] *Wharton's Criminal Law and Procedure* (Anderson edit. 1957):

> "§ 1507—In many cases requisite elements of the completed crime may be commited in different jurisdictions, and in such cases any state in which an essential part of the crime is committed may take jurisdiction. It is necessary, however, to discriminate with great care between acts essential to the crime and acts merely incidental thereto. For example, the mere forwarding of money from one state to another for . . . any . . .

there is no substantial authority to the contrary.[39] The case of *De Rosier* v. *United States*, 218 F. 2d 420 (C. A. 5), relied on below (247 F. 2d at 134), is not in point, since there was no place of performance fixed by law, and the matter was already within the jurisdiction of the federal agency at the time of mailing.[40]

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transaction forbidden by the laws of the former state, does not constitute a crime punishable therein, although it is otherwise if the statute makes the forwarding of the money, and not merely the transaction itself, a crime.

"§ 1510—In many states statutes have been passed providing for venue in either county, where a crime is committed partly in one county and partly in another. Such statutes apply only when the offense is divisible and when each of the parts committed in the different counties is itself unlawful. . . . If the act committed in one county did not constitute any element of the crime charged, then such county does not have jurisdiction, a statute of the type here considered not being applicable. . ."

[39]In *Bridgeman* v. *United States;* 140 Fed. 577 (C. C. A. 9) relied on by the Government, the place of filing was not fixed by law. In *United States* v. *United States District Court,* 209 F. 2d 575 (C. A. 6), involving a prosecution for filing a false income tax return, venue for trial at the place of mailing was upheld (Miller, C. J., dissenting). However, the indictment had been lodged at the place of filing the return and the defendant sought transfer to the place of mailing, so the case is essentially no different from *United States* v. *Bryson* 16 F. R. D. 431 (N. D. Cal.).

[40]The *De Rosier* case involved a government employee loyalty proceeding in which, after the Post Office Department Loyalty Board in Washington had written a letter to the defendant in Florida charging him with membership in the Ku Klux Klan and giving him 30 days to answer, the defendant mailed a reply in Florida containing the alleged false statements. The court (Holmes and Borah, Circuit Judges) upheld venue of the prosecution under 18 U. S. C. 1001 in Florida, relying on 18 U. S. C. 3237. But the decision has no bearing here, because the matter was already within the jurisdiction of the Loyalty Board at the time the defendant mailed the reply, and (so far as appears in the opinion) because there was no place fixed by law for filing the reply. See *United States* v. *Valenti,* 120 F. Supp. 76 (E. D. N. Y.) (no place fixed by law for filing) and *United States* v. *Dolan,* 119 F. Supp. 309 (E. D. N. Y.) (matter already within jurisdiction of Federal Housing Administration when mailed), in

Apart from the legal considerations set forth above,[41] there are strong considerations of judicial policy that support restriction of venue, in cases such as the present one, to the district in which the offense is committed. Multiple venue under 18 U. S. C. 3237 is no doubt desirable in the situations for which the statute was intended such as conspiracy, where there may be numerous defendants, and acts in furtherance of the conspiracy committed in several districts, or where the essence of the crime is the wrongful use of the mails or the channels of interstate commerce, and the criminal act itself pervades two or more districts.

But none of these considerations is applicable here, since Congress has carefully specified the *locus* of the offense, and the crime consists of the single act of filing a document at the place specified by law.[42] The Sixth Amendment states

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which these very differences were expressly relied upon to uphold venue based on mailing.

However, the *de Rosier* case, as well as the *Bridgeman* and *District Court* cases, *supra* footnote 39, although not in conflict with the rule establishing venue at the place fixed by law for filing, are in conflict with *Burton* v. *United States* and the dictum in the *Palliser* case, both *supra* p. 23.

[41]The indictment in the present case (R. 1-4) does not charge petitioner with mailing the affidavits, and timely objection was made (R. 5) on the ground that the indictment failed to state facts showing an offense in the District of Colorado. Hence, even if venue might be grounded on mailing if properly charged, the indictment against petitioner must be dismissed, since ". . . under the Sixth Amendment to the Constitution the accused cannot be tried in one district on an indictment showing that the offense was not committed in that district . . ." *Salinger* v. *Loisel*, 265 U. S. 224, 232. To be sure, the trial court (R. 15) ordered the Government to establish mailing by a bill of particulars, but such a bill cannot be used to cure an indictment's lack of an essential allegation, where timely challenge before trial has been made. *United States* v. *Lattimore*, 215 F. 2d 847, 850 (C. A. D. C.); *United States* v. *Lamont*, 236 F. 2d 312, 315 (C. A. 2).

[42]Neither, under these circumstances, are the considerations referred to in *United States* v. *Johnson*, 323 U. S. 273, governing here. In that case the defendant's crime was complete in Illinois where he deposited the unlawful dentures in the mail, and the Government

that trials shall be held where the crime is committed, and in cases such as the present one, the thrust of constitutional policy is against multiple venue, and against trial in any district except the one in which the place of the crime is designated by law. There is no reason why the accused should be subject to trial in either of two districts at the Government's choice. Under the Sixth Amendment multiple venue is the exceptional, not the usual, and the language of 18 U. S. C. 3237 should not be stretched so as to create multiple venue except where the Constitution clearly permits and statutory policy warrants such a result.

The *residence* of the accused is, of course, irrelevant, since the constitutional guarantee relates to the place where the offense is committed, and that place, not the residence of the accused, is the vicinage. *Haas* v. *Henkel*, 216 U. S. 462. On this point the trial court was misled (R. 14), as was the court in *United States* v. *Cashin*, 281 F. 2d 669 (C. A. 2). In both instances reliance was placed on the *Johnson* case, wherein the Court spoke (323 U. S. at 275) of remoteness "from home and from appropriate facilities for defense", but it is clear that the Court was looking to the vicinage of the offense, not the accused's residence, and would have reached the same result if the accused had resided elsewhere.[43]

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sought to establish additional venue in Delaware where the dentures were received. Since the offense was complete in Illinois and Congress had not expressly provided for continuing venue, the Court held (323 U. S. at 275-278) that there was venue only in the district of mailing, which was the vicinage of the offense. But in the present case it is the filing upon receipt, and not the mailing, which constitutes the offense. The crime is committed only when the affidavit is filed and the vicinage of the offense is the District of Columbia, not the District of Colorado.

[43]Even if residence were a factor to be considered, the venue here sought to be established would not necessarily lead to trial at the place of residence. It is true that the petitioner, as Secretary-Treasurer of the union, lived in Denver, where the union's headquarters were

Quite apart from the rights of the accused under the Sixth Amendment, there is also the factor of *certainty*. Litigation over the issue of venue is time-consuming and expensive for all parties. The rule of single venue at the place specified by law for the filing of documents or performing any other act is a highly salutary one from the standpoint of certainty. To open up the rule to a flood of exceptions based on the theory of a "beginning" in some other district would inevitably lead to a host of totally unnecessary false starts and appeals, of which the instant case gives sufficient warning.[44]

Even from the Government's standpoint, accordingly, dismissal of this indictment for improper venue is a small price to pay for the jurisdictional stability that will flow from a reaffirmation of the well-established rule that venue lies only in the place fixed by law for the performance of the act on which the accusation is based.

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located. But the union mailed to Washington not only the petitioner's affidavits, but those of the Board members for the several regional districts of the union throughout the country (R. 27-34, 48, 447, 453-55, 513, and 884-89).

[44]If, for example, the union's resident officer in Cleveland executed his affidavit there and sent it to Denver, from where it was mailed to Washington with the affidavits of the other union officers, would the government seek venue in Cleveland as well as in Denver and Washington? Compare with the present case *United States* v. *Cashin*, 281 F. 2d 669, wherein the government took the position (directly contrary to their posture here), in a prosecution for fraudulent securities sales under the Securities Act of 1933 (15 U. S. C. 77), that there was no venue in Alabama where the fraudulent scheme was formed and executed, but only in New York where the federal mails were subsequently used in furtherance of the scheme. The court's contrary decision, whether right or wrong, is inapplicable here since no place of performance was fixed by law in the Securities Act.

II.

PETITIONER'S MOTIONS FOR THE PRODUCTION OF GRAND JURY TESTIMONY WERE ERRONEOUSLY DENIED.

Two (Eckert and Mason) of the three Government witnesses testified in 1954 before the grand jury which indicted petitioner, and all three Government witnesses testified in 1956 before a grand jury in the same district which indicted the petitioner and 13 others for conspiracy to file false Taft-Hartley affidavits[45] (R. 273, 344, 448, 498, and 688). At the trial, after each of the three witnesses had completed his direct testimony, the defense moved that his testimony before the grand juries about the petitioner be produced directly to the defense or, if that motion were denied, to the trial judge *in camera*, for delivery to the defense in the event that the court's examination disclosed inconsistencies of testimony (R. 118, 131-40, 448, 487, and 677-78). The motions were denied when made, and again when renewed after cross-examination (R. 136-40, 414-36, 448, 487, 677-80, and 782-84).

The defense, it thus appears, asked that the secrecy of the grand jury proceedings be invaded only "discretely and limitedly" for the purpose of impeaching the prosecution witnesses. See *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 683. The two issues presented here are (1) whether the record shows such a "particularized need" as required production of the grand jury minutes to the defense in the interest of fair procedure, under the rule laid down in the *Procter & Gamble* case *supra*, and if not (2) whether the trial court erred in refusing to inspect the grand jury testimony of these witnesses *in camera*, to determine whether any part of it should be made available to the defense.

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[45] *Raymond Dennis et al.* v. *United States*, pending on appeal to the Court of Appeals for the 10th Circuit (Nos. 6451-59).

A. The Grand Jury Testimony of the Prosecution Witnesses Should Have Been Produced to the Defense for Use on Cross-Examination

The general principles governing production of grand jury testimony for use on cross-examination have recently been discussed and applied by this Court in *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395. It was held there that grand jury minutes lie outside the scope of 18 U.S.C. 3500; that the defense has no absolute right to the production of such minutes, but should be given access when a "particularized need" is shown that "outweighs the policy of secrecy"; and that the defense need not, in order to establish such a need, make any preliminary showing of inconsistency between the witness' testimony on trial and his grand jury testimony.

The reasons which governed the decision in the *Pittsburgh Plate Glass* case have no application to the present one. There (360 U. S. at 399) the defense asserted a "right" to examine the testimony under "the rationale of" *Jencks* v. *United States*, 353 U. S. 657, on the bare ground that it "dealt with subject matter generally covered at the trial." Under these circumstances, this Court held that the defense in the *Pittsburgh Plate Glass* case had "failed to show any need whatever" for the grand jury testimony. In the present case, however, the defense addressed its argument to the trial court's discretion (R. 132-41, 414-36, 677-80, and 782-84), and made an extensive showing of the circumstances giving rise to the need for access to the grand jury testimony.[46]

[46]There was motion and argument with respect to each witness, both before and after cross-examination (R. 118, 131-40, 414-36, 448, 487, and 672-80). The most extensive argument, and the Court's fullest statement of reasons for denying the motions, followed the cross-examination of the witness Eckert (R. 414-36).

Denying the motions, the trial judge ruled that even a general showing of possible inconsistency would not suffice, and that grand jury minutes should not be made available unless the inconsistency (R. 436) "goes to the very basis of the matter". Furthermore, the trial judge sustained the prosecution's objections to questions put by the defense (R. 403-04, 530-35, 538, and 686-87) to the prosecution witnesses, the purpose of which was to ascertain whether or not they had testified to the grand jury with respect to particular episodes which they testified about at the trial—a ruling which was erroneous and prejudicial in itself, quite apart from its bearing on the matter of access to the minutes.

In both these respects, the trial judge's ruling was plainly contrary to this Court's holding in the *Pittsburgh Plate Glass* case, *supra,* that a preliminary showing of inconsistency is unnecessary, and that the defense should be allowed opportunity to establish "a particularized need". Affirming the judgment of conviction, the Court of Appeals was equally in error, for its opinion (R. 927-28, 269 F. 2nd at 945-46) is squarely based on the Court's belief that no showing of probable inconsistency had been made.

Since the trial court failed to exercise its discretion under proper standards, and refused to allow the defense to develop the basis for its request by appropriate questions to the witnesses, the conviction must be reversed whether or not a sufficient showing of "particularized need" appears on this record. In fact, however, the showing was more than ample.

This Court has not yet had occasion to specify the factors which a trial judge should take into account in weighing the defendant's showing of "particularized need" for grand jury testimony for use in cross examination.[47] Generally

[47]The *Procter & Gamble* case, in which the phrase was first used, involved a request by a defendant in a civil suit for wholesale access

speaking, it would appear that such access should be allowed, in the interest of fairness, whenever there is a reasonable possibility that comparison with the grand jury testimony may make possible a sharper evaluation of the witness' testimony at the trial.

In practice, of course, this principle must be applied with due regard to the reasons for which grand jury testimony is ordinarily held secret. These reasons, as recognized by this Court[48], are particularly important in the pre-trial stage in a criminal proceeding, or where there is a blanket request for a large amount of grand jury testimony.[49] However, after the grand jury's functions are completed, and a limited request such as the one here in question is made, "disclosure is wholly proper where the ends of justice require it." See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 234.

In the present case, the need for access was both manifest and acute. It was undisputed that the defendant had been a member of the Communist Party, and had publicly resigned before signing the affidavits, and for that avowed

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to grand jury testimony, for use in the preparation of its case. Such circumstances, as this Court pointed out (356 U. S. at 683), bear no resemblance to the situation where, as here, the request is by a defendant in a criminal case, and is limited to the testimony of a prosecution witness who has testified at a public trial.

[48]See the *Pittsburgh Plate Glass* case, *supra*, at 399-400, and the *Procter & Gamble* case, *supra*, at p. 681 footnote 6. In the latter case, this Court cited with approval the reasons for grand jury secrecy as listed in *United States* v. *Rose*, 215 F. 2nd, 617, 628-9 (C. A. 3), wherein they are in turn derived from *United States* v. *Amazon Industrial Chemical Corp.*, 55 F. 2nd 254, 261 (D. Md.).

[49]None of the reasons given in *United States* v. *Rose*, *supra* footnote 48, has any application to cases such as the present one, except the general encouragement of "free and untrammeled disclosures" by grand jury witnesses. This policy is entirely sound, but of course it is of negligible weight where, as here, the request is limited to the testimony of particular witnesses who have already appeared in the public trial.

purpose. The issue before the jury was whether or not he had maintained a covert membership in or affiliation with the Party. The prosecution produced no evidence of continued payment of dues, attendance at meetings, or other normal attributes of membership. The evidence consisted entirely of statements allegedly made by the petitioner to one of the prosecution witnesses, invariably in the presence of no one else.

This is just the sort of evidence which courts have traditionally viewed with misgivings, because it is so easily fabricated, exaggerated, or colored. In the present case, much might depend on the exact words used by a witness in reporting one of these alleged "uncorroborated" admissions by the petitioner.

A good example is the testimony by Gardner (R. 443-45) about the conversation during an automobile trip from Port Colborne to Buffalo in the fall of 1951, during the course of which petitioner is supposed to have stated that his public resignation from the Party had been a mistake because "it gave the enemies of the Party an opportunity to use that in pointing out that his wasn't a true resignation from the Party, that actually it was done merely to conform to the Taft-Hartley affidavits". Did Gardner describe this conversation to the grand jury? If so, did he use substantially the same words?[50] The comparison might well have assisted the jury in evaluating Gardner's testimony. The possibility of significant discrepancy is certainly not remote, for Gardner's description of the same episode in other proceedings has been significantly different. Testifying before the Subversive Activities Control Board, for example, Gardner attributed the belief that petitioner's resignation from

[50]The importance of checking the previous record on matters such as this is vividly illustrated by the Government's transmutation of the word "public", actually used by Gardner, to "formal" in describing this episode to this Court, as shown *supra*, p. 6 footnote 5.

the Party was not genuine, not to "the enemies of the Party" but to the American and Canadian "authorities".[51]

The same considerations apply to the other witnesses. All three testified to the petitioner's uncorroborated "admissions". All three were former employees of the employees of the petitioner's union, whose separation from it and subsequent activities (R. 26, 92-106, 437, 453-54, 474-86, 567-70, 733, and 745-49) involved circumstances indicative of prejudice and hostility toward the defendant. Eckert and Mason had testified on previous occasions, and there were inconsistencies in the testimony of each (R. 414-36, 782-83, and 929); Gardner had made no references, in his reports to the Federal Bureau of Investigation, to either of the two episodes which comprised all of his direct testimony at the trial. *Cf. Jencks* v. *United States*, 353 U. S. 657, 667.

In the light of the foregoing considerations, the petitioner's "particularized need" for the grand jury testimony of the three prior witnesses was abundantly shown. See *U. S.* v. *Zborowski*, 271 F. 2d 661, 666 (C. A. 2). Had the trial judge exercised his discretion in accordance with the applicable standards of criminal procedure, production of the testimony to the defense must have been held necessary in order to attain the ends of justice.

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[51] See *Rogers* v. *International Union of Mine, Mill & Smelter Workers*, SACB No. 116-56, typewritten transcript, p. 4884:

> "A. Travis told me that he was very happy that I could come with Mine-Mill, I had come well recommended from the Cleveland party, and we also discussed the problems of getting over the border, and he told me that he felt that one of main problems was his public resignation from the party at the time of his signing of the non-communist affidavits, and that he was quite convinced that neither the American nor the Canadian authorities believed his resignation was genuine, and as a result he had had this difficulty in getting over the border."

B. If Not Produced Directly to the Defense, the Grand Jury Testimony Should Have Been Preliminarily Examined by the Trial Court in Camera

In the *Pittsburgh Plate Glass* case, *supra*, the petitioners claimed error because the trial judge failed to examine the grand jury minutes for inconsistencies. This Court did not pass on that claim (360 U. S. at 401) ". . . because petitioners made no such request of the trial judge". In the present case such a request was made (R. 136, 414, 487, 677-78, and 782), and accordingly this record presents the issue reserved in the *Pittsburgh Plate Glass* case.

There is no question but that, under the practice of the Court of Appeals for the Second Circuit, petitioner's request that the trial court examine the grand jury testimony of the prosecution witnesses would have been granted. Under that practice, examination of the grand jury testimony by the trial judge is automatic, when the defense suggests the possibility of inconsistency between the trial testimony and the grand jury testimony. Refusal of a request for examination *in camera* would be erroneous, for the reasons set forth in *United States* v. *Zborowski*, 271 F. 2nd 661, 665 (C. A. 2):[52]

> "For many years it has been the unvarying practice in this Circuit to permit defense counsel to use inconsistent grand jury testimony for impeachment

[52] See also *United States* v. *McKeever*, 271 F. 2nd 669, 672 (C. A. 2): "In this Circuit the procedure whereby grand jury testimony may be made available to the defense is well established. After a government witness has testified on direct examination, if there appears to be some basis for supposing that his grand jury testimony may be at variance with his trial testimony, the defense may ask the trial judge to examine the witness' grand jury testimony. If the trial judge finds any material discrepancy between the trial testimony and the grand jury testimony, such part of the minutes is made available to the defendant. *United States* v. *Spangelet*, 2 Cir., 1958, 258 F. 2d 338."

purposes. The rule is that when the defendant points out a possible inconsistency between the trial and the grand jury testimony of a government witness and requests the trial judge to examine the witness' grand jury minutes, the trial judge must then read the minutes *in camera*. Finding any substantial discrepancy, he must make available to the defendant the minutes or an intelligible segment thereof containing the inconsistency. But where the trial judge finds no such inconsistency, he should, upon request, seal the grand jury testimony so that it is available on appeal. United States v. Spangelet, 2 Cir., 1958, 258 F. 2d 338; United States v. Angelet, 2 Cir., 1958, 255 F. 2d 383; United States v. H. J. K. Theatre Corp., 2 Cir., 1956, 236 F. 2d 502, certiorari denied Rosenblum v. United States, 1957, 352 U. S. 969, 77 S. Ct. 359, 1 L. Ed. 2d 323; United States v. Alper, 2 Cir., 1946, 156 F. 2d 222."

In *Jencks* v. *United States*, 353 U. S. 657, this Court disapproved the practice of *in camera* examination, for the discovery of inconsistencies, of a prosecution's witness' prior statements to Government agents, and ruled that such a statement should be made available to the defense, which alone (353 U. S. at 668) ". . . is adequately equipped to determine the effective use for purpose of discrediting the Government's witnesses and thereby furthering the accused's defense . . ." However, the *Jencks* case did not deal with grand jury testimony[53], and we suggest that the considerations with respect to *in camera* examinations are not entirely parallel as between grand jury minutes and prior statements to Government agents.

The three factors chiefly considered in the decisions in this field are authenticity, materiality, and secrecy. The first of these is of importance in connection with prior

[53]See *United States* v. *Pittsburgh Plate Glass Co.*, 360 U. S. 395, 398.

statements to Government agents, for these may not have been recorded with sufficient accuracy to justify their use for purposes of impeachment.[54] But the factor of authenticity has no application to grand jury testimony, which is stenographically recorded and as accurate as any record is likely to be.

The factor of materiality is necessary in order to keep requests for prior statements or grand jury testimony within the bounds of what is reasonably necessary for the administration of justice. Where the request is not unwieldy, however, there is no particular danger in making immaterial statements or testimony available to the defense, unless the factor of secrecy is also involved. There are policies of secrecy with respect to both statements to Government agents and grand jury testimony, but they are by no means identical.

With respect to statements to Government agents, the policy of secrecy is based primarily on the need for concealing the identity of Government informers, and protecting other persons mentioned in the statements from unnecessary embarrassment. If the statement falls within the scope of 18 U. S. C. 3500 and is relevant to the testimony given by the witness on direct examination, the policy of secrecy gives way to requirements of due process, and the statement must either be made available to the defense, or the witness' testimony is stricken or a mis-trial is declared. However, the factor of secrecy is important enough to justify a preliminary *in camera* examination by the trial court, for the excision of irrelevant portions in accordance with 18 U. S. C. 3500.

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[54]It is for this reason that 18 U. S. C. 3500(e) limits the type of statements which must be produced to the defense to those which are written or embodied in "a substantially verbatim recital of an oral statement".

The policy of secrecy for grand jury minutes rests upon more numerous and diverse reasons[55] than the policy with respect to statements to Government agents. Most of these are inapplicable when a grand jury witness is subsequently called to testify at the trial. Nevertheless, such testimony may contain irrelevant portions, and may mention innocent bystanders to their unnecessary embarrassment. Or it may be interspersed with grand jurors' questions or comments, or observations by state attorneys, which perhaps should not be disclosed. Or the grand jury testimony may have been taken as the basis for a different indictment, in which event still other considerations come into play.[56]

It is unnecessary to decide, in the present case, whether or not under any circumstances the policy for secrecy of grand jury testimony might justify withholding material and relevant grand jury testimony of a prosecution witness, and denying the defense access to such testimony for use on cross examination.[57] Certainly, however, the secrecy policy may well justify a preliminary examination of grand jury testimony *in camera*, for the elimination of irrelevant and immaterial testimony. Ordinarily the prosecution will know

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[55] *Supra*, p. 33 and footnote 48.

[56] For example, Gardner's grand jury testimony was not given in connection with the present case, but in support of the indictment in *Dennis* v. *United States*, *supra* p. 30 footnote 45, in which the petitioner is one of fourteen defendants. In colloquy before the trial court in the present case, prosecution counsel charged (R. 425) that the request for Gardner's testimony was "a fishing expedition to prepare for the trial of the fourteen defendants". As appears *supra*, pp. 34-35, there was a very particular need for Gardner's testimony for use on cross examination in the present case. However, assuming for purposes of argument that there was a basis for the prosecution's concern about a "fishing expedition", adequate protection against this would be furnished by preliminary *in camera* examination, and the elimination of irrelevant portions.

[57] Certainly in the event that *in camera* inspection should disclose substantial inconsistencies, such a withholding might raise serious questions of due process.

well enough whether the entire testimony of one of its witnesses may properly be turned over to the defense, or whether there are circumstances requiring a preliminary *in camera* examination.

The practice in the Court of Appeals for the Second Circuit appears to have developed in line with the foregoing principles. When the defense requests the grand jury testimony of a prosecution witness, the Government may voluntarily make the witness' entire grand jury testimony available. See *United States* v. *Stromberg*, 268 F. 2d 256, 273 fn. 16. If the prosecution opposes the request, the trial court examines the grand jury testimony *in camera*, and turns over to the defense such portions as appear to contain inconsistencies. A refusal to examine, on the part of the trial court, is erroneous and requires reversal of the conviction. *United States* v. *Hernandez*, F. 2d (August 24, 1960). Such portions of the testimony as are not made available to the defense, are sealed with the record so as to be available for review on appeal. *United States* v. *Zborowski, loc. cit. supra*. That there are many advantages to such a procedure sufficiently appears from the circumstance that in three recent cases the Court of Appeals has found inconsistencies in the testimony which escaped the attention of the trial judge, and has reversed the judgments of conviction on that ground. *United States* v. *Zborowski, supra*; *United States* v. *McKeever, supra*; *United States* v. *Spangelet, supra*.

It is suggested, however, that the procedure of the Court of Appeals for the Second Circuit is erroneous in one important particular. Under the principles enunciated in the *Jencks* case, *supra*, the purpose of discovering inconsistencies is not sufficiently served by examination *in camera*, but requires for its fulfillment examination by counsel charged with the defense of the case. See *Jencks* v. *United States*,

353 U. S. at 669; *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. at 407-10 (dissenting opinion). For these reasons it would appear that the purpose of the *in camera* examination should not be to discover inconsistencies, but rather to eliminate irrelevant and immaterial testimony, and take such further precautions as may be necessary in accordance with the applicable reasons for maintaining the secrecy of grand jury testimony.

In the present case, however, none of these things were done. The prosecution opposed *in camera* examination of the grand jury minutes as vigorously as it opposed the direct delivery of those minutes to the defense. Neither the prosecution nor the trial court made any effort to determine whether there were inconsistencies in the grand jury testimony, and the trial court sustained objections to all efforts by the defense to strengthen its showing of particularized need by questions to the prosecution witnesses. Under all these circumstances, the judgment below must be reversed.

III.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE JUDGMENT OF CONVICTION

At the trial and in the court below, petitioner unsuccessfully urged that the evidential requirements applied in perjury trials are equally applicable here. Even if the Court should reject this contention, however, the evidence was insufficient to support the conviction, and petitioner's motion to dismiss should have been granted.

A. The Evidential Requirements of Perjury Are Applicable to this Case

Under the decisions of this Court, the federal courts continue to apply the common law requirements with respect to the *quantum* of proof in perjury cases. Under those

requirements, a conviction for perjury cannot stand unless either (a) two or more witnesses testify that the alleged perjurious statement was false, or (b) one witness so testifies, and there is corroborative evidence.

From time to time the rule has been criticized, and fifteen years ago the government asked this Court to discard it. *Weiler* v. *United States*, 323 U. S. 606. The matter was fully considered, and the Court unanimously rejected the proposal, on the ground that the perjury rule was long-established and the government had not shown sufficient reason for its abandonment.

The government has not, in the present case, renewed its challenge to the validity of the rule itself. But it contends, and the court below held, that the rule does not apply to false-affidavit prosecutions under the Taft-Hartley law or, indeed, to any cases under 18 U. S. C. 1001. It is true that two other courts of appeals have reached the same conclusion as the court below.[58] However, there has been sharp division of opinion among the circuit judges,[59] and Judge Murrah's dissent in the court below was based on this point (269 F. 2d at 946, R. 928-29) as well as on the trial court's refusal to examine the grand jury testimony.

The "false statement" statute, 18 U. S. C. 1001, applies to unsworn as well as sworn statements. For this reason, it might be argued in other types of prosecutions under this provision that the perjury rule is not applicable.[60] But it is unnecessary to decide that question here, for under Section 9(h) of the Taft-Hartley law, the provisions of 18

[58] *United States* v. *Killian*, 246 F. 2d 77, 82 (C. A. 7), rev'd on other grounds, second conviction aff'd 275 F. 2d 561, pending here on pet. for cert. No. 141 this term; *Fisher* v. *United States*, 231 F. 2d 99, 105-06 (C. A. 9). The court below had previously so held in *Sells* v. *United States*, 262 F. 2d 815, 821-22 (C. A. 10).

[59] This question, among others, was presented in *Gold* v. *United States*, 237 F. 2d 764 (C. A. D. C.), reversed on other grounds 352 U. S. 985. The Court of Appeals affirmed the conviction by an equal division; Judge Bazelon alone wrote an opinion, in which he took the view that the perjury rule was applicable. 237 F. 2d at 765-67.

[60] There appear to be no other cases under 18 U. S. C. 1001 in which the question has arisen.

U. S. C. 1001 are expressly made applicable to "affidavits" filed with the National Labor Relations Board.

Since an affidavit by definition is a sworn statement, this and other prosecutions based of affidavits filed pursuant to Section 9(h) are prosecutions for false swearing. The fact that it is not a prosecution for perjury in the common-law sense is irrelevant, since false swearing in an affidavit filed with the Board is the gist of the offense. The evidential rules applied in perjury trials are equally applicable here, just as this Court held them applicable in a prosecution for subornation of a false oath in bankruptcy. *Hammer* v. *United States*, 271 U. S. 620. Indeed, in the *Douds* case Chief Justice Vinson referred to the offense for which this petitioner has been indicted as "false swearing" (339 U. S. at 411), and Justices Frankfurter and Jackson referred to it as "perjury" (339 U. S. at 420 and 436).

The government's principal argument to the contrary is that this case falls within the exception to the perjury rule where the alleged falsity relates to a "subjective" matter. For example, where it is charged that the accused falsely declared that he *saw* or *remembered* something, the courts have said that such matters, being incapable of direct proof, may be shown by circumstantial evidence.[61]

But petitioner's membership in or affiliation with the Communist Party is not a subjective matter. Of course, state of mind enters into the status of membership or affiliation, as this Court has pointed out.[62] Nevertheless, there must be overt manifestations of membership or affiliation, and in the *Douds* case this Court clearly expressed

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[61] *Behrle* v. *United States*, 100 F. 2d 714, 715 (C. A. D. C.); *People* v. *Doody*, 172 N. Y. 165, 172, 64 N. E. 807, 808 (1902); *Regina* v. *Hook*, 27 L. J. M. C. 222, 169 Eng. Reprint 1138 (Ct. Crim. App. 1858).

[62] *Galvan* v. *Press*, 347 U. S. 522; *Bridges* v. *Wixon*, 326 U. S. 135; *Jencks* v. *United States*, 353 U. S. 657, 679 (concurring opinion of Mr. Justice Burton).

the view that membership and affiliation are capable of direct proof. In fact, it was recognition that the issue of *belief* in unlawful violence is *not* susceptible of direct proof, and must be proved circumstantially, that was chiefly responsible for the sharp and equal division within the Court on the constitutionality of that portion of Section 9(h) relating to belief. Thus, Chief Justice Vinson wrote (339 U. S. at 410-11):

> "In proving that one swore falsely that he is not a Communist, the act of joining the Party is crucial. Proof that one lied in swearing that he does not believe in overthrow of the Government by force, on the other hand, must consist in proof of his mental state. To that extent they differ.
>
> "To state the difference, however, is but to recognize that while objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does."

And in his opinion concurring in part Justice Jackson drew the same distinction (339 U. S. at 436):

> "The only sanction prescribed, and probably the only one possible in dealing with a false affidavit, is punishment for perjury. If one is accused of falsely stating that he was not a member of, or affiliated with, the Communist Party, his conviction would depend upon proof of visible and knowable overt acts or courses of conduct sufficient to establish that relationship. But if one is accused of falsely swearing that he did not believe in something that he really did believe, the trial must revolve around the conjecture as to whether he candidly exposed his state of mind."

These statements are a sufficient answer to the government's view that "requirement of direct proof is require-

ment of the impossible."[63] As Justice Jackson put it, membership or affiliation can be proved by "visible and knowable acts or courses of conduct."[64] This is just the sort of issue to which the perjury rule has always been applied, and accordingly it is properly applicable in the present case.

B. If the Perjury Requirements are Applicable, the Judgment of Conviction Must be Reversed

Assuming the perjury rule to be applicable, the mechanics of its use at a trial are well settled. Upon motion to dismiss, if the defense claims that the requirements have not been met, the judge must determine whether there is sufficient direct, or direct and corroborative, evidence to satisfy the rule, in the event that the jury believes the evidence. If the judge cannot so determine, the defendant must be acquitted.[65] If he does so determine and the case goes to the jury, the court must, on proper request, instruct the jury in the requirements of the rule, and direct them to acquit the defendant in the event they do not find sufficient credible evidence to satisfy the rule. See *Weiler* v. *United States*, 323 U. S. 606, 610.

In the present case, the trial court did neither of these things. Petitioner, in moving for a judgment of acquittal,

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[63]See *Sells* v. *United States*, 262 F. 2d 815, 822 (C. A. 10), quoted and relied on in the government's Brief in Opposition to the petition for certiorari in this case, at p. 12. In that case, the defense failed to request that the jury be instructed in accordance with the perjury rule.

[64]See also *United States* v. *Neff*, 212 F. 2d 297 (C. A. 3); *United States* v. *Remington*, 191 F. 2d 246 (C. A. 2). *Cf. Hupman* v. *United States*, 219 F. 2d 243 (C. A. 6), in which the government produced two witnesses who gave direct testimony of the defendant's attendance at Party meetings. The court's reference (219 F. 2d at 247) to "circumstantial evidence" relates not to the issue of falsity, but to the issue whether the defendant signed and filed the alleged affidavit.

[65]See *United States* v. *Neff*, 212 F. 2d 297, 306 (C. A. 3); *United States* v. *Rose*, 215 F. 2d 617, 625 (C. A. 3).

expressly relied on the perjury rule (R. 807, Tr. 1114). Later, he requested that the jury be instructed in accordance with the rule (R. 828). However, in the view of the trial judge the perjury rule was not applicable, and accordingly he took no account of it in ruling on the motion for an acquittal (R. 822, Tr. 1114), and refused to instruct the jury in accordance with the rule (R. 831).

It follows that if the rule is applicable, the conviction must be reversed. Under these circumstances it is superfluous to add that, since (as the court below observed, R. 911) the government's case is circumstantial, and direct evidence is wholly lacking, the evidence fails to meet the requirements of the rule. The government has said nothing to the contrary.

C. The Rule against Conviction Based on Uncorroborated Admissions was Violated

Conviction may not be based on uncorroborated extrajudicial admissions of the accused made after the alleged commission of the offense. Such admissions, like confessions, are so untrustworthy that they are, in themselves, insufficient to warrant a finding of guilt. *Opper* v. *United States*, 348 U. S. 84.

Petitioner's conviction violates the rule enunciated in the *Opper* case. As has been seen (*supra*, pp. 4-5), it was undisputed at the trial that petitioner had been a member of the Communist Party, and had publicly resigned from the Party in 1949. The only issue for determination by the jury was whether or not the petitioner had maintained (or re-established) a clandestine membership in or affiliation with the Communist Party, which extended to the times when the allegedly false affidavits were signed, in December 1951 and 1952.

The government's evidence, offered to show that a clandestine relationship persisted, consisted entirely of "admissions" which petitioner supposedly made in the course of conversations with the witnesses Gardner and Mason. In fact the statements in these conversations were entirely consistent with innocence. But even if they had contained admissions that petitioner was a member of or affiliated with the Communist Party when the affidavits were executed, the admissions would be insufficient unless corroborated.

There was no corroboration. First, there was no evidence whatsoever of any other occurrences subsequent to the filing of the 1951 affidavit which could give rise to an inference of membership or affiliation at or after that time. Second, there was nothing in the evidence of events prior to the execution of the 1951 affidavit which corroborates the post-affidavit admissions.

The government contends[66] that "petitioner's admissions were amply corroborated by the extensive evidence of his activities as a Party member." But this evidence, emanating exclusively from Eckert, related entirely to petitioner's activities prior to Eckert's separation from the Party in 1948. Accordingly, it cannot possibly serve to corroborate evidence offered to show that petitioner was still a member of the Party at the time he signed the affidavits.

The government also contends that the rule of the *Opper* case applies only to admissions made to law-enforcement authorities. It is true that the admission in the *Opper* case was made to agents of the Federal Bureau of Investigation.[67] However, the rationale of the decision is not so

[66]Brief of the United States in Opposition to the Petition for Certiorari, p. 15.

[67]In *Smith* v. *United States*, 348 U. S. 147, decided on the same day as the *Opper* case, the Court applied the rule against conviction based on uncorroborated admissions in a tax case, where the accused's statements had been made to Federal tax agents. The opinion states

limited. On the contrary, the theory upon which the opinion proceeds is inconsistent with any such limitation, for the Court stated (348 U. S. at 89-90) that not only "the zeal of the agencies of prosecution", but also "the self-interest of the accomplice, the maliciousness of an enemy, or the aberration or weakness of the accused under the strain of suspicion" might "tinge or warp the facts of the confession", to such an extent that it could not serve as the sole basis for a conviction. There do not appear to be any cases supporting the distinction urged by the government; on the contrary, there are at least two decisions in which the corroboration requirement has been applied, without discussion, although the admissions were made to private individuals. *United States* v. *Carminati*, 247 F. 2d 640, 644 (C. A. 2), cert. den. 355 U. S. 883; *United States* v. *Nystrom*, 237 F. 2d 218, 225 (C. A. 3)

The record in this case is entirely barren of any evidence that the petitioner commited the crime of which he is charged, except testimony by two of his enemies, relating conversations that took place years earlier. The requirement of corroboration is especially necessary in cases of this type, and a conviction which rests on evidence so frail and freighted with bias and interest may not be permitted to stand.

D. Without Reference to the Foregoing Evidential Requirement, the Evidence is Insufficient to Sustain the Conviction

The evidence that petitioner was a member of or affiliated with the Communist Party in December 1951 or De-

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that (at p. 155) the rule should be applied "... . at least where, as in this case, the admission was made after the fact to an official charged with investigating the possibility of wrong doing . . . ", but there is no indication that the Court would have come to a different conclusion had the admission been made to a private person.

cember 1952 was plainly insufficient, even if the perjury rule and the rule against conviction based on uncorroborated admissions are deemed inapplicable. The extensive evidence of petitioner's activities in the Communist Party from 1942 to 1948 is insufficient, for reasons that have already been stated. And there is no proof that in 1951 or 1952, or at any time following his public resignation from the Party, petitioner attended Party meetings, or paid dues or made other financial contributions to the Party, or that the Party considered him or that he considered himself bound by Party decisions or discipline in any way.

The only evidence pertinent to the crucial issue in the case, accordingly, is the testimony of Gardner and Mason about their conversations with the petitioner during or subsequent to the period covered by the affidavits. Even when viewed in a light most favorable to the government, this post-affidavit evidence contains little which even tends to prove the charge, and is plainly insufficient to support the judgment of conviction.

The conversations in the course of which these admissions supposedly were made are set forth in the opinion below (R. 908, 910). In his dissent, Judge Murrah described this evidence (269 F. 2d at 946 R. 928) as "indeed indirect and circumstantial and, in my judgment inconclusive". An analysis of this evidence bears out his opinion.

At most, petitioner's admissions in the five conversations tend to show that he may have been in sympathy with Communist trade union policy, that he had respect for the Party and was occasionally influenced by the Party or Party members, and that he had sporadic contact with Party members. No more than this can be concluded from what petitioner said to Mason in March 1952 about his role in rejecting the notion of a third labor federation. Petitioner's reference to "us Communists" in his talk with

Mason in March 1953 apparently meant no more than that as an acknowledged member who had withdrawn from the Party only because of 9(h), he would be a target of public attack and of legislation like the McCarran Act. Petitioner's advice to Gardner in June 1953 about the situation in the Communist Party in Idaho, fairly construed, shows no more than that he knew what was going on there and wished to keep the union and Gardner clear of the dangers of being involved in the Party's factional dispute. Finally, Mason's rambling testimony of his two talks with petitioner in the summer of 1953 show, at most, that the latter was still aligned with the so-called left wing group in the union.

Even if the most damaging construction is put on this testimony and the most damaging inferences drawn from it, the evidence is insufficient to prove membership or affiliation. Petitioner may have talked like a Communist and may even have referred to himself as one. It might be that the evidence tends to show continued "belief" in the Party. The charge, however, was membership and affiliation, not belief, and the element of mutuality which lies at the heart of both relationships is not shown by the evidence.

Lacking any proof of Party connection or activity of any sort, the evidence was manifestly insufficient to go to the jury. Even if assumed to be true, these snatches of conversation show nothing more than sympathy with some of the Party's aims—a sympathy which petitioner openly proclaimed at the time of his resignation. Such evidence is no proof of continuing membership or affiliation, and the conviction must be set aside.

IV.

PETITIONER WAS DENIED A FAIR TRIAL BY THE COURT'S RULINGS WITH RESPECT TO THE ADMISSION AND EXCLUSION OF EVIDENCE, AND THE APPLICATION OF 18 U. S. C. 3500

The trial court, over objection, received testimony of the witness Eckert which was irrelevant and incompetent and highly prejudicial. The court likewise refused to permit cross-examination of the three prosecution witnesses in order to show that one (Mason) was fearful of adverse government action because of his former Communist Party membership, and that the other two, as employees of rival unions, were biased against the petitioner and his union. Furthermore, the trial court's interpretation and application of 18 U. S. C. 3500 were erroneously and prejudicially limited.

A. Prejudicial Evidence was Erroneously Admitted

Over objection and after extensive argument (R. 107-117) the court permitted the witness Eckert to give the following testimony (R. 117-18):

> "Q. Mr. Eckert, from your experience in the Communist Party and from your membership in the Communist Party during the period from 1931 until the time you left the Party in 1948 do you know whether or not there was a Party policy on resignation from the Communist Party? . . .
>
> "A. Yes.
>
> "Q. And will you state what the policy of the Party was in that respect?
>
> "A. The policy of the Party was that once having joined the Communist Party you could not leave without being expelled."

The prejudicial effect of this testimony is plain enough for, since it was admitted that Travis was a member of the

Communist Party until 1949, the jury might be led to infer that he *could not* have resigned at that time, because of the contrary Party policy. Indeed, on summation the prosecution urged the jury to draw that very conclusion.[68]

But the conclusion is an untenable one, and the testimony was inadmissible (on grounds of both competence and relevance) for the purpose for which it was offered. Testimony that the Communist Party had a policy against "recognizing" resignations does not establish that the petitioner (or any other member) could not resign.[69] In the *Douds* case (339 U. S. at 414) this Court specifically ruled to the contrary, and upheld the constitutionality of Section 9(h) on the very ground that a union official who was a member of the Communist Party could resign his membership and sign the affidavit. Commenting on similar testimony given in the *Gold* case, Judge Bazelon pointed out (237 F. 2d at 772):

> "If no one can effectively resign from the Party, no union officer with appellant's history can ever comply with §9(h), and the statutory phrase 'is not

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[68]Tr. 1168-69 and especially 1210, where prosecution counsel, after referring to Eckert's estimony, told the jury. "In other words, once you join the Communist Party you remain a member of the Communist Party unless you are expelled. One may drop out, he may quit paying dues, not attend meetings and so forth, and as far as the individual is concerned he may consider himself out of the Party but not so far as the Communist Party is concerned. . . . Now, the fact that one cannot resign from the Communist Party makes the procedure followed by Travis in this so-called resignation statement utterly ridiculous."

[69]The testimony flies in the face of authoritative data showing that the history of the Communist Party in this country has always been characterized by wholesale separations. Hoover, *Master of Deceit* (1958) p. 5 and chap. 9; Howe and Coser, *The American Communist Party* (1957) pp. 528-29. In 1952, it was estimated, in a study of ex-Communists in the United States, that there were more than 700,000 such. Ernst and Loth, *Report on the American Communist* (1952) p. 14.

> a member' is precisely equivalent to 'has never been a member'. This possibility Douds specifically rejects."

The government[70] supports the admission of this testimony on the ground that it was probative of the Party's "acceptance" of the petitioner as a member. But the testimony was neither offered nor received for that purpose, and the court below correctly pointed out that (R. 913)[71] "without more" this evidence ". . . could show nothing of the state of mind of the defendant and could not show that he did not, in fact, resign from the Party on the date he claimed."

The court below approved admission of the testimony on the ground that (R. 915) it was "relevant in the interpretation of the defendant's statements and behavior". Plainly, however, the evidence was incompetent and irrelevant for this purpose unless the petitioner knew of and accepted the Party's alleged policy, and petitioner requested that the jury be so instructed (R. 896). The instruction was refused, and this ruling was approved below on the ground (R. 913) that there was "related evidence" from which "the jury could properly infer that the defendant continued to act in obedience to this policy and that his resignation was understood to be in form only. . . ."

However, there would be no basis for such an inference unless there was evidence that the petitioner knew of and accepted the policy. The trial court recognized this and initially received the testimony subject to connection by means of other evidence (R. 114). On subsequent motion to strike the testimony (R. 785), the court ruled that there was sufficient evidence of connection to send the question of

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[70]Brief in Opposition to Certiorari, pp. 14-15.

[71]The government (*ibid.*) misread the opinion below; its error is due to omitting from the sentence it quotes, the portion quoted in the text above.

petitioner's knowledge of the policy to the jury (R. 790). Assuming the ruling was correct, the instruction should certainly have been granted, for if the jury was not satisfied that petitioner knew of the policy, the testimony could not be treated as evidence against him. Therefore, the court below erred in approving the refusal of the requested instruction, regardless of the sufficiency of the evidence of knowledge.

But in fact there was no evidence that petitioner knew of any such policy as Eckert testified to. The court below (R. 914-15) and the trial court (R. 790) so regarded the testimony that petitioner knew of the discussion in Party circles about the Taft-Hartley law, and the policy problem of compliance or non-compliance. But this testimony in no way tends to establish petitioner's knowledge of a general Party policy, dating back years prior to the Taft-Hartley law, against leaving the Communist Party other than by expulsion.

Finally, Eckert's testimony was incompetent on grounds of lack of foundation and remoteness. It was offered and received as expert testimony,[72] but it wholly lacked any factual support. Even more important, it related only to the period up to 1948 when Eckert left the Party, whereas petitioner resigned in 1949 and did not sign the first of the two affidavits until December, 1951.

The remoteness is more than merely temporal, both with respect to the existence of the policy and petitioner's knowledge thereof. The prosecution's case was built on the theory that in 1949 the Communist Party changed its policy with respect to compliance with the Taft-Hartley law, and that petitioner's resignation was in accord with the new compli-

[72]The court below thought otherwise (R. 915), but the record plainly shows that the trial court received Eckert's testimony as the opinion of an expert (R. 113-14 and 789), and so described it to the jury in his charge (R. 858-59, 874).

ance policy.[73] Assuming that in 1948 there was a pre-existing Party policy against recognizing resignations, there is no basis for presuming that it continued through 1949 to 1952, despite such a profound change in the circumstances as the Taft-Hartley law brought about.

For all these reasons, Eckert's "can't resign" testimony was incompetent and irrelevant, and its receipt in evidence was prejudicial error. Even if properly received, the trial court's refusal to instruct the jury to disregard the testimony unless satisfied that petitioner knew of and accepted the policy, was prejudicial error.

B. Cross-examination of Prosecution Witnesses Was Erroneously and Prejudicially Restricted

The trial court refused to permit the defense to show, by cross-examination, that Mason's testimony for the prosecution was affected by his fear of denaturalization and deportation, and that the testimony of Eckert and Gardner against petitioner was affected by interest, in that both were officials of unions competitive with and hostile to petitioner's union.

1. *Mason*—Mason came to this country from Yugoslavia in 1923 and was naturalized in 1938 (R. 738-40). He had been a member of the Communist Party in the 1930's, before his naturalization (R. 738). The defense sought to show that he had been interrogated in 1952 by the Immigration and Naturalization Service about his past membership in the Communist Party; that he was fearful that he might be denaturalized and deported and that he had sought advice about his status; and that, because of this

[73]This was the thrust of petitioner's public statement at the time of his resignation, and of his alleged statements to the witness Mason, on which the government and the court below principally rely (R. 906 and 914).

fear, he became an informant for the FBI and a witness against petitioner following his interrogation by the Immigration and Naturalization Service (R. 738-44).

The trial judge ruled that this line of interrogation was not permissible unless the defense could also show that the government had actually made a threat or a promise to Mason related to his status as a naturalized citizen (R. 742-44). The court below, on the other hand, upheld the ruling of the trial judge on the ground that Mason, as a naturalized citizen, was not subject to deportation, and that he could not be denaturalized because, since he had revealed his past Communist Party membership when he was naturalized in 1938, he had not committed fraud (R. 918).

Neither basis is tenable. To say that Mason could not legally be denaturalized or deported does not meet the issue. Even if, as a matter of law, Mason could not be denaturalized or deported, a threat which he feared might still have been made. Furthermore, he himself had been in doubt whether the 1950 statute applied to him, and had sought advice about the matter.

Aside from any threat or promise, therefore, the defense was entitled to show that Mason had demonstrated his concern about his status under the 1950 statute. Mere hope or belief on the part of a prosecution witness that he may profit by testifying for the government, even if there is no objective basis for his hope or belief, bears on his credibility. *Parkas* v. *United States*, 2 F. 2d 644, 647 (C.A. 6); *Spaeth v. United States*, 232 F. 2d 776, 779 (C.A. 6); 62 ALR 2d 610. (listing comparable state court decisions at 639-42). The fact that Mason was interrogated in 1952, even though his status as a citizen was secure, and the fact that it was only a short time later that he became an informant for the FBI and a witness against petitioner and Mine, Mill[74] tends

[74]The Service interrogated Mason in February, 1952 (R. 739). Thereafter, he became an informant for the FBI, apparently some-

to support an inference that he hoped or believed that by cooperating with the government, he would shield himself from unpleasant consequences.

2. Eckert and Gardner—The trial court also erred in ruling that the defense could not show, in cross-examining Eckert and Gardner, that the labor organizations of which they were officials were sharp and unfriendly rivals of petitioner's union.

At the time he testified, Eckert was assistant director of the Die Casting Department of the United Automobile Workers (R. 26). He had been associated with that union since 1948, shortly after he had left petitioner's union, at which time he led some local unions out of Mine, Mill and into the U. A. W. (R. 355). The trial court did not allow the defense to show, by cross-examining Eckert, that the U. A. W. had been Mine, Mill's principal competitor in the East since 1948 and that the two organizations had opposed each other in many Labor Board elections (R. 354-56).

Gardner has been an official of the International Hod Carriers, Building and Common Laborers Union of America since January, 1956, a few months after he had been discharged by petitioner's union (R. 437, 568). After the defense, without objection, had asked Gardner several questions about the competition between the Hod Carriers and Mine, Mill (R. 567-70), the trial court, *sua sponte,*

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time in 1953 (R. 681-82), when he was still a member of the Mine, Mill Executive Board (R. 453). He made his first appearance as a witness against petitioner and Mine, Mill in 1954 in the Labor Board proceeding to decomply Mine, Mill which this Court held to be unauthorized in *Leedom v. International Union of Mine, Mill and Smelter Workers,* 352 U. S. 145 (R. 685). In 1955, Mason testified against petitioner on the latter's first trial on this indictment (R. 685).

cut off this line of interrogation (R. 569-70) and then, after colloquy, instructed the jury to disregard the testimony the witness had already given on the subject (R. 659).

Both the trial court (R. 630-31) and the court below (R. 918-19) held that evidence of the rivalry of the unions was too remote to have a bearing on the bias and credibility of the witnesses. The court below acknowledged that a witness in a civil case may be cross-examined as to his bias and interest by reason of his employment relationship with a party,[75] but concluded that in a criminal case, where an individual and not the union was the defendant, the rivalry between the unions had "only a slight and indirect bearing" on the credibility of the witnesses (R. 919).

The distinction drawn by the court below is artificial and unrealistic. Petitioner filed the allegedly false affidavits as secretary-treasurer of Mine, Mill. A conviction of a national officer of a union on a charge such as this is obviously a serious blow to the standing and prestige of the union and may be exploited by its rivals. Nor do the decisions support a distinction between civil and criminal pro-

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[75]The court cited (R. 919) *Central Truck Lines* v. *Lott*, 249 F. 2d 722 (C. A. 5), where the witness testified for his employer; *Majestic* v. *Louisville and N. R. Co.*, 147 F. 2d 621 (C. A. 6), where the employer of the witness had an interest in the recovery; *Lexington Glass Co.* v. *Zurich etc. Ins. Co.*, 271 S. W. 2d 909 (Ky. App.), where the witness was employed by the law firm representing the party for whom he testified; *Manley* v. *Northumberland County*, 32 F. Supp. 775 (M. D. Pa.), where the employer of the witness was a competitor of the party against whom the witness testified; and its own decision in *Theurer* v. *Holland Furnace Co.*, 124 F. 2d 494, where the witness was an adjuster for a group of fire insurance companies, with a possible interest in a suit for damages for negligent installation of a furnace. In *Atlantic Coast Line R. Co.* v. *Dixon*, 207 F. 2d 899, 904 (C. A. 5), it was held that the plaintiff could show, by cross-examination of a foreman, that testimony contrary to that which he gave on direct would subject him to criticism by the defendant railroad.

ceedings or between the directness or indirectness of the interest of the witness.[76]

In *Napue* v. *Illinois*, 360 U. S. 264, this Court said (at 269):

> "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend".

In this case, "the truthfulness and reliability" of the witnesses were particularly important matters to explore because the witnesses had not been mere spectators of the events they described from the witness stand but had been deeply involved in them and because the testimony of each was crucial to the government's case. The restrictive rulings of the trial court, therefore, constituted highly prejudicial error.

C. The Trial Court's Application of 18 U. S. C. 3500 Was Erroneously and Prejudicially Limited

In its interpretation and application of 18 U. S. C. 3500, the trial court erred in two important respects. The first

[76] In civil cases, an employment relationship as bearing on bias and interest need not be with a party. Thus, in *Lexington Glass Co.* v. *Zurich etc. Ins. Co.*, 271 S. W. 2d 909 (Ky. App.), a party was permitted to show that the witness was an employee of the law firm representing the opposing party; and the court below has had occasion to say that a witness may be cross-examined about his membership in an organization to which one of the parties belongs or as to whether he and the opposite party are adherents of rival political factions. *Ice Way Motor Freight, Inc.* v. *True*, 165 F. 2d 38, 41. In criminal cases, it has been held that the state of mind of a witness may be shown by evidence of fraternal lodge affiliation, *Felice* v. *State*, 18 Okla. Cr. 313, 194 Pac. 251; bitterness between families, *Ham* v. *State*, 21 Ala. App. 103, 105 S. 309; and race or nationality, *People* v. *Krug*, 10 Cal. App. 2d 172, 51 P. 2d 445. And in *District of Columbia* v. *Claasens*, 300 U. S. 617, 630-31, this Court said it was error to restrict cross-examination designed to show the interest of railroad detectives in a prosecution for illegal traffic in train tickets.

relates to the procedure for determining whether or not a document falls within the purview of "statement" as defined in 18 U. S. C. 3500(e). The second involves the production of statements which may have been made by prosecution witnesses to government attorneys and Congressional committee agents.

A. The procedure for settling doubtful problems under 18 U. S. C. 3500(e) has been described by this Court in *Palermo* v. *United States*, 360 U. S. 343, at 354:

> "The statute itself provides no procedure for making a determination whether a particular statement comes within the terms of (e) and thus may be produced if related to the subject matter of the witness' testimony. Ordinarily the defense demand will be only for those statements which satisfy the statutory limitations. Thus the Government will not produce documents clearly beyond the reach of the statute for to do so would not be responsive to the order of the court. However, when it is doubtful whether the production of a particular statement is compelled by the statute, we approve the practice of having the Government submit the statement to the trial judge for an *in camera* determination. Indeed, any other procedure would be destructive of the statutory purpose."

The three members of the Court who concurred in the result were of the same opinion on this point (360 U. S. at 361):

> "Questions of production of statements are not to be solved through one party's determination that interview reports fall without the statute and hence that they are not to be produced to defense counsel or to the trial judge for his determination as to their coverage. I am confident that federal trial judges will devise procedural methods whereby their responsibility is not abdicated in favor of the unilateral de-

termination of the prosecuting arm of the Government".

The procedure so described was not followed in the present case. Instead, the trial court took the position (R. 151-55, 488-94, and 527) that it is exclusively for the prosecution to determine whether or not a document in its possession is producible under 18 U. S. C. 3500, and that the court's only function is to review documents produced *in camera* for the excision of irrelevant matter. Furthermore, the court suggested to the prosecution that it not produce any documents other than such as the prosecution would be willing to have the court automatically treat as "statements" within the meaning of 18 U. S. C. 3500 (e), and the prosecution acceded to the suggestion (R. 493-94).[77]

Since the *Palermo* decision, the Court of Appeals for the Second Circuit has twice had occasion to apply the procedure therein described. In both cases, that court has held that the trial court not only should review "doubtful" documents, but should also, if necessary to an enlightened decision, conduct a *voir dire* examination *in camera* to resolve the question. *United States* v. *Tomaiolo,* 280 F. 2d 411; *United States* v. *McKeever,* 271 F. 2d 669. In both cases, convictions were reversed because the court disagreed with the trial court's rejection of the document as outside the scope of 18 U. S. C. 3500(e), and because the trial court had failed to pursue the question by a *voir dire* examination.

These decisions plainly show that the problem is not an abstract or technical one, and that the rights of the accused may be seriously infringed by an unduly narrow application of the statute in question. In the present case, the procedure was clearly erroneous under this Court's decision in the

[77] Under these circumstances, it is unnecessary to inquire whether or not the government thereafter withheld "doubtful" documents which, but for the court's ruling, would have been submitted for *in camera* review under 18 U. S. C. 3500(e).

Palermo case, and contrary to the proper practice as illustrated in the *Tomaiolo* and *McKeever* cases.[78]

B. In the course of trial, it was developed that the prosecution witnesses had conferred with or been interviewed by government attorneys on the subject-matter of the case (R. 274, 345, and 624) and that the witness Eckert had discussed the case with an agent of a Senate investigating committee (R. 218). The petitioner's motion for the production of statements under 18 U. S. C. 3500 extended to statements made to government attorneys and Congressional committee agents (R. 121-22). The prosecution, however, took the position that 18 U. S. C. 3500 does not embrace such statements (R. 122-29).

The trial court, despite petitioner's repeated contention, failed to rule on the legal issue, and refused to order the prosecution to produce any statements in the possession of the United States that might be in the hands of other government attorneys or Congressional agents (R. 131). The defense, having no other course then open to it, thereupon undertook to cross-examine the prosecution witnesses with respect to their discussions with such attorneys and agents, to lay a foundation for the renewal of the motion for production (R. 217-21, 255-59, 273-90, 345-54, 372-84, 623-26, and 643-54). Thereafter petitioner renewed the motions for production, specifying that statements to government attorneys and Congressional agents were included in its scope (R. 270, 384-85, 656, and 780). The motions were denied, on the ground that the existence of such statements had not been established by the cross-examination (R. 271, 387-91, 657-58, and 781).

The result of the trial court's rulings was to frustrate the purpose of 18 U. S. C. 3500. The statute explicitly

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[78]See also *Holmes* v. *United States*, 271 F. 2d 635 (C. A. 4), reaching a parallel conclusion under the analogous provision of 18 U. S. C. 3500(c).

covers "any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." This language plainly imposes on the prosecution the burden of making such inquiry as may be necessary to uncover *all* statements (or "doubtful" statements for review *in camera*) "in the possession of the United States". There was no basis for the prosecution's contention that the statute does not cover statements to government attorneys or Congressional agents, and the government apparently makes no such contention in this Court.[79]

In the present case the prosecution avowedly made no effort to determine whether or not there were statements producible under 18 U. S. C. 3500 in the hands of other government attorneys or Congressional agents, and explicitly disclaimed any responsibility for making inquiry to these sources (R. 122, 125, 128-29, and 387). The trial court declined to direct the prosecution to make such inquiry (R. 781).

The court below upheld the trial court's application of the statute on the ground that (R. 926) "there is nothing in the record to indicate that these witnesses had in these instances written, signed, adopted, or approved any writing or that any recording was made of any oral statement made to these agents." But under 18 U. S. C. 3500 the issue is not what the record shows about the *fact* of the existence of statements producible under the statute, but whether it shows that the prosecution and the trial court have taken the proper steps, on request, to carry out the statutory requirements. Here the record shows the contrary.

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[79]Brief in Opposition to the petition for certiorari, p. 17. A letter to a government attorney was involved in *Rosenberg* v. *United States*, 360 U. S. 367, and a Senate agent's summary of an interview was at issue in *Lee* v. *United States*, 360 U. S. 470. In neither case was it suggested that these sources are outside the scope of 18 U. S. C. 3500.

V.

PETITIONER WAS DENIED A FAIR TRIAL BY THE COURT'S CHARGE TO THE JURY WITH RESPECT TO THE INDICIA OF MEMBERSHIP IN OR AFFILIATION WITH THE COMMUNIST PARTY

At the prosecution's request and over the petitioner's objection (R. 824-25), the trial court embodied in its charge to the jury eleven of the thirteen indicia of membership in the Communist Party in Section 5 of the Communist Control Act of 1954, 50 U. S. C. 844 (set forth in the Appendix, *infra* pp. 2a-4a). The relevant portion of the charge (R. 871-72) authorized the jury to "take into consideration whether the defendant" had done any of the things specified in clauses (3) to (13) inclusive of Section 5, together with "all the evidence either direct or circumstantial" bearing on the question of membership.

The validity of Section 5 of the Communist Control Act, in its application to the Internal Security Act of 1950, 50 U. S. C. 781 *et seq.*, is among the issues presented in *Communist Party of the United States of America* v. *Subversive Activities Control Board*, now pending (No. 12) following argument in this Court. The present case raises question of Section 5's validity as applied in criminal proceedings where membership in or affiliation with the Party is a governing issue of fact and, assuming its validity on its face, whether it was properly applied in this case.

The constitutional problems under the First and Fifth Amendments are plain on the face of the statute. To begin with, the preamble makes the ensuing "criteria" or "indicia" applicable only to "the Communist Party or any other organization defined in" the Communist Control Act. There is no rational basis for such a classification. As the

trial court charged the jury in this very case (R. 871): "Membership in the Communist Party, the same as membership in any other organization, constitutes the state of being one of those persons who belong to or comprise the Communist Party." Obviously, there is no reason for applying criteria such as those listed in Section 5 to the issue of membership in organizations defined in the Communist Control Act, but not to other organizations.

Secondly, the listed criteria, even if otherwise reasonable are invalid because unlimited in terms of time. All are explicitly made applicable to persons who, in the past, have done any of the things listed in the statute. No temporal limit is specified, and accordingly it must be assumed that evidence fitting the criteria shall be considered by the jury even if it relates to the remote past, and the defendant's supposed connection with the Party has long since terminated. This irrational element in the statutory standard was carried over into the instructions, for these left the jury free to consider the petitioner's conduct during the years of his conceded membership in the Party (as early as 1942), as evidence of his membership in 1951 and 1952.

The preamble states that the jury shall consider "evidence, if presented, as to whether the accused person" engaged in any of the conduct specified in the ensuing criteria. This language suggests that the jury should consider only affirmative evidence of conduct falling within the criteria, and give no weight to a failure of proof with respect to other criteria. Such a standard of proof is manifestly unreasonable, and grossly unfair to the accused.

In the present case, the trial court omitted from the instructions the first two criteria, dealing with membership lists and records of financial contributions. These are the only two criteria that, indisputably, bear a close relation to proof of membership. Presumably they were not included

in the charge because there was no evidence that, at the time the affidavits were signed, the petitioner was listed as a member of or made any financial contributions to the Communist Party. In other words, there was a complete failure of proof in this area; nevertheless, petitioner was deprived of the benefit of the strong negative implications and inferences which the jury might well have drawn from this lack of proof, had these criteria been included among the others.

Furthermore, if the first two criteria were omitted for lack of relevant evidence, so should others have been. There was, for example, absolutely no evidence that, at or near the time petitioner filed his affidavits, petitioner had "prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization" or "sent or delivered to others material or propaganda of any kind in behalf of the organization" (clauses (9) and (10) of Section 5).[80]

But the vice of embodying these criteria in the instructions lies even deeper than the foregoing considerations indicate, for most of the prescribed indicia are so vague and unprecise, and so remote from the facts of membership or affiliation, that their use clearly violates the due process clause. *Tot* v. *United States*, 319 U. S. 463, 467; *Lanzetta* v. *New Jersey*, 306 U. S. 451. Clauses (9) and (11), for example, make it evidence of membership for anyone to confer, counsel, or write or distribute literature "in behalf of the objectives" of the organization. Especially since other clauses (such as clauses (1) to (5)) refer to action for or in behalf of "the organization", this reference in clauses (9) and (11), as well as (12) and (13), to the "objectives" of

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[80]With the possible exception of petitioner's statement of resignation, there was no proof fitting these categories at *any* period of time.

the organization, would appear to cover mere parallelism. As *The Wall Street Journal* put it,[81] apparently referring to clause (12):

> "One of these provisions is that it would be evidence of cooperation with the Communist groups if any person has indicated a willingness to carry out aims and purposes of the party. For all we know the Communist Party may be against juvenile delinquency. So is this newspaper."

Standards such as these violate not only the due process clause, but the First Amendment as well. Their impact on freedom of speech, press, and assembly is direct, for clauses (6), (9), (10), (11), and (12) expressly deal with conferring, meeting, writing, and disseminating literature. In *De Jonge* v. *Oregon*, 299 U. S. 353, it was held that lawful exercise of the First Amendment freedoms may not constitutionally be penalized merely because the auspices are those of a subversive organization. But the present case goes much farther, because clause (11), for example, covers advising or counselling not only with "officers or members of the organization" but also with "anyone else" in behalf of the "objectives of the organization." See *Winters* v. *New York*, 333 U. S. 507, 519.

It is no answer to say that Section 5 is not a penal statute, or that the criteria it embodies are not absolute tests. The inescapable fact is that it directs judges to instruct juries that speech or writing, uttered or distributed quite independently of the Communist Party (or other organization), shall be considered as evidence of membership in the organization if it is "in behalf of the objectives" of the organization. The statutory mandate is hopelessly vague and unreasonable, and its acceptance as a standard of proof would be a sympton of decay in our judicial practice.

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[81] In its issue of Aug. 19, 1954, quoted in 100 Cong. Rec. 15111.

VI.

PETITIONER'S MOTIONS FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE WERE ERRONEOUSLY DENIED

In Nos. 3 and 71, petitioner filed motions for a new trial, under Rule 33 of the Federal Rules of Criminal Procedure based on newly discovered evidence bearing on the credibility of the witness Fred Gardner. The new evidence may be summarized as follows:

No. 3—In *Haug* v. *United States*, pending here on petitions for certiorari (Nos. 73 and 74 Misc. and 93), Gardner, testified that he had never served in the armed forces. He had also so informed the Federal Bureau of Investigation in 1955, as appears from a report furnished to the petitioner on the trial of the present case, under 18 U. S. C. 3500 (R. 4). The newly discovered evidence shows (R. 2-3) that Gardner had been in the United States Army during the 1920's and had deserted in 1926. The new evidence also discloses (R. 4, 8-9) that he had given the F. B. I. false information about the places and dates of his employment and residence during the period from 1925 to the early 1930's.

No. 71—As a witness in the present case and the *Haug* case, and in information which he furnished to the F. B. I., Gardner gave four different versions of his two marriages. In 1955, he told the F. B. I. (as appears from the document furnished to petitioner under 18 U. S. C. 3500, referred to above in No. 3) that he had married his second wife in 1945, but had not been divorced from his first wife until 1946 (R. 4). In January 1958, Gardner testified in the *Haug* case that he was divorced in 1945 and had remarried a few weeks thereafter (R. 4). Later that same month, under cross-examination in the present case, he testified that he had been divorced in March 1946 and had

married his second wife in November of that year. The new evidence, embodied in the testimony Gardner gave during the hearing on motion for a new trial in the *Haug* case, indicates that the version given by Gardner to the *F. B. I.* in 1955 is closest to the truth (R. 5, 13-16).

The facts are not in serious dispute, nor has the government contested the allegation in the first of the two motions (No. 3) that Gardner's testimony was essential to the proof of petitioner's guilt (R. 2). The basic issue is whether or not the newly discovered evidence warrants a new trial, under the general principles of *Mesarosh* v. *United States*, 352 U. S. 1, *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, and comparable decisions.[82]

It is true that a distinction has sometimes been drawn between new evidence relating to a material issue, and new evidence which relates to the credibility of the witness. Under the circumstances of this case, however, such a distinction would be arbitrary and unrealistic. The new evidence, especially that in No. 3 relating to Gardner's military service, does not deal with minor or immaterial discrepancies. This new evidence establishes conclusively that Gardner was a conscious and deliberate prevaricator, in his testimony about his military record and his marital history.[83]

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[82]In No. 71, petitioner also contends that the new evidence discloses that in No. 10 the trial court improperly interfered with the cross-examination of Gardner about his marital history, by openly expressing agreement with the prosecuting attorney's remark that the F. B. I. report contained a typographical error in stating that Gardner had "married" a second time in November 1945, before his divorce in 1946 (R. 9). Gardner's testimony on the hearing in the *Haug* case shows that this was not a typographical error, as Gardner well knew at the time he was testifying at petitioner's trial, and heard the prosecutor and court express their mistaken assumption.

[83]By giving the F. B. I. false information about his military record, Gardner may well have violated the very statute (18 U. S. C. 1001) under which petitioner stands convicted. A jury might well hesitate to convict a man for lying to a federal agency, on the testimony of another man who had himself lied to another federal agency.

The *Communist Party* and *Mesarosh* cases, *supra,* as well as *Napue* v. *Illinois,* 360 U. S. 264, have gone far to eliminate the distinction between new evidence relating to material issues, and new evidence with respect to credibility. The credibility of a witness may well, of course, be the crucial issue in a jury's mind. In the present case, the only evidence against petitioner was the testimony of Gardner and Mason concerning their conversations with petitioner during the period covered by his affidavits. It can not be seriously argued that new evidence, exposing Gardner as a liar and a deserter from the armed forces, does not go to the heart of the government's case against the petitioner.

Even if the new evidence is not deemed sufficient on its face to warrant a new trial, it was error for the trial court to deny the motion (in No. 3) without hearing. The trial court appears to have denied a hearing (R. 44-52) on the ground that the new evidence was collateral in nature, and that therefore a hearing would accomplish nothing. But this conclusion ignored the suggestion in the motion (R. 5) that Gardner, to cover up his desertion, might have lied about other matters, and the demand for disclosure of the government's previous knowledge, if any, of Gardner's desertion and his previous false statements (R. 5-6). Under these circumstances, it was an abuse of discretion to deny a hearing. *Cf. Remmer* v. *United States,* 347 U. S. 227.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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APPENDIX

1. The Sixth Amendment to the Constitution of the United States provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

2. 18 U. S. C. 1001 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

3. 29 U. S. C. 159 (h) (Section 9 (h) of Taft-Hartley) provides:[1]

No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued

[1]Repealed by Section 201(d) of the Labor-Management Reporting and Disclosure Act of 1959 (P. L. 86-257).

pursuant to a change made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit, executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code[2] shall be applicable in respect to such affidavits.

4. Section 5 of the Communist Control Act of 1954, 50 U. S. C. 844, provides:

In determining membership or participation in the Communist Party or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented, as to whether the accused person:

(1) Has been listed to his knowledge as a member in any book or any of the lists, records, correspondence, or any other document of the organization;

(2) Has made financial contribution to the organization in dues, assessments, loans, or in any other form;

(3) Has made himself subject to the discipline of the organization in any form whatsoever;

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[2] 35A of the Criminal Code was repealed by section 21 of the Act of June 25, 1948, 62 Stat. 862, and is now covered by 18 U.S.C. sections 286; 287, 1001 (involved here), 1002 and 1023

(4) Has executed orders, plans, or directives of any kind of the organization;

(5) Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the organization;

(6) Has conferred with officers or other members of the organization in behalf of any plan or enterprise of the organization;

(7) Has been accepted to his knowledge as an officer or member of the organization or as one to be called upon for services by other officers or members of the organization;

(8) Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans of the organization;

(9) Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectivgs and purposes of the organization;

(10) Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization;

(11) Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the organization or to anyone else in behalf of the objectives of the organization;

(12) Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization;

(13) Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization;

(14) The enumeration of the above subjects of evidence on membership or participation in the Community Party or any other organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated.

5. 18 U. S. C. 3500, the so-called "Jencks" law, provides:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion, of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to

deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsection (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

6. 18 U.S.C. 3237, the "continuing offense" statute, provides:

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.